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CONVEYANCER'S NOTEBOOK

Development Charges and Compensation for Loss of Development Value.—The abolition of the development charge under the Town and Country Planning Act, 1947, in respect of development commenced after November 17, has been generally welcomed. The theory that the transfer of development rights from private to public ownership would result in land changing hands at existing use value and would not affect the ultimate prices of buildings has proved wildly wrong; indeed, as the government now recognise, the financial provisions of the 1947 Act were having the effect of withdrawing building land from the market. The government's policy, as disclosed in the White Paper (Cmd. 8699, price 6d.), is, in general, to abolish the financial provisions, but a landowner will still be entitled to compensation at the 1947 value when the loss of development is realised, *i.e.*, when permission to develop is refused. In the Town and Country Planning Bill at present before Parliament clause 1 provides for the abolition of the development charge for future development and for repayment of any charge paid in respect of development not actually commenced before November 18. Clause 2 repeals the provisions made by the 1947 Act for the distribution of the £300 million fund and provides that assignments made after November 17 of claims for compensation for loss of development rights require the approval of the Central Land Board, it being the intention that so far as possible claims should run with the land.

The principal difficulty facing the government is to make provision to give some measure of justice to persons who have developed, sold or bought land since the coming into force of

the 1947 Act. Whatever scheme were devised, it is almost certain that injustice would result. If development charges were repaid and claims for compensation wiped out, the person who had sold his land at existing use value, relying on his claim, would be penalised and the purchaser who had developed correspondingly benefited. The government's solution is that where a claim for compensation has been made and a development charge been paid, the claim is also to be paid. Paragraph 46 of the White Paper reads : " There are two clear principles. The first is that there can be no question of repaying development charge as such. When a tax is altered or rescinded no question of repayment arises, and although development charge is not strictly a tax the same principle applies here. The second principle is that it is to the holder of the claim that any payment that is due, having regard to the new proposals, should prima facie be made. It is the people who hold claims on the fund, and whose loss will already have been sustained by the time the full amending legislation comes into operation, who are entitled to consideration in the transitional arrangements."

The first of these principles neither rests on a correct analogy nor is based on a sound precedent. When Lloyd George's land value duties were repealed by the Finance Act, 1920, section 57 (3) provided that any person who had at any time paid any land value duty, or his legal representative, was entitled to repayment. The owner of land in respect of which no claim lies—and it may well be through no fault of his—who has paid a development charge ought in justice to be repaid. As the government have rightly recognised that a rule-of-thumb application of the second principle would work injustice, so ought the first principle be subject to qualification.

In applying the second principle a distinction is drawn. Where there has been no change of ownership, except by compulsory acquisition, before November 18, the claim will be paid to the landowner on July 1, 1948. So also where the claim has devolved with the land the landowner for the time being will be paid. Where the claim has become separated from the land the claim will be paid to the person who is justly entitled to it and, if necessary, apportioned. Where land was sold at something above the existing use value, the vendor still keeping the claim, " he has already been paid for the whole of his 1947 value. Her Majesty's Government do not think that it would be right in these cases to pay the claim blindly to the holder; and they propose to pay him only so much of the claim as is needed to make up the price already

received for the land to the amount of the 1947 unrestricted value." The balance will go to the person who has paid the development charge.

The December issue of the Journal of Planning Law contains 10 neat and clear examples of the way in which the White Paper proposals will work, as well as the whole text of the White Paper.

Building Licences.—The government have decided to increase the licence-free allowance for building and repairs. The amounts of £200 for houses and flats and £500 for industrial buildings and farm buildings at present are for the year from July 1, 1952, to June 30, 1953. These amounts are to remain the same but the period is limited until the end of this year. For the calendar year 1953 the amounts are to be increased to £500 and £2,000 respectively. The regulations are contained in the Control of Building Operations (No. 18) Order, 1952 (S.I. 1952, No. 2111).

Demolition Orders and Party Walls.—In *Birch* v. *Wigan Corporation* [1952] 2 All E.R. 893, three houses out of a terrace of six were unfit for human habitation and not capable of being rendered fit at a reasonable cost. The local authority, instead of making a demolition order in respect of these three houses, sought to make a closing order. The Housing Act, 1936, s. 11, provides for the making of a demolition order in respect of a "house" which is unfit, and section 12 provides for the making of a closing order where part of a building is unfit. The local authority's argument was that the terrace constituted one building and each house was part of the whole building. It is hardly surprising that the majority of the Court of Appeal rejected this contention and held that sections 11 and 12 are mutually exclusive. As each house was a "house" within the meaning of section 11, it followed that a closing order could not be made.

Denning L.J.'s dissenting judgment seems to proceed on the supposition that if a demolition order is made in respect of one house in a terrace there is no protection for the owners of the adjacent houses. He said at p. 894 : "The solution of the problem is to be found, I think, by supposing that the six houses were all in different ownership, as, for instance, if each occupier owned his own house. If an order is made for the demolition of the three unfit houses, what is to happen to the owners of the three fit ones? . . . Can it be supposed that Parliament intended to take

away their right of support without any protection for their houses and without any compensation for the damage done to them? . . . The Act contains no provision for the protection of the adjacent houses at all. It does not say that anyone is to do any shoring up, even if shoring up would be of any avail, or to treat the dividing wall or partition so as to make it weatherproof. It does not give the owners of the good houses any remedy if the demolition renders their houses damp or unsafe, and I do not see that they would have any remedy—not, at any rate, if the demolition were carried out with reasonable care. The statutory authority to demolish would be a bar to any action by the neighbouring owners." With respect, is the learned Lord Justice's supposition correct?

The question of repair of party walls has come into some prominence in recent years. In most cases it is not necessary to rely upon the terms of the original grant dealing with the party wall, for an easement of support will arise after due lapse of time and it is unusual for an owner of property bounded by a party wall to have greater rights. It seems to be fairly well settled that there is no liability on an owner of property whose building falls into disrepair if, as a result, the adjoining building enjoying an easement of support tumbles down. A correspondent points out that in *Bond* v. *Nottingham Corporation* [1940] Ch. 429, the Court of Appeal held that, where a demolition order is made in respect of a building which is subject to an easement of support, neither the owner nor the local authority may demolish that building without providing an equivalent support for the dominant tenement. Sir Wilfrid Greene M.R., as he then was, said, at p. 438 : " The nature of the right of support is not open to dispute. The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If it does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support. *But what the owner of the servient tenement is not entitled to do is, by an act of his own, to remove the support without providing an equivalent.*" (The italics are ours.)

Provision against Inflation.—In Vol. 12, at p. 322, we published a precedent of a clause for insertion in a lease providing for variation in the amount of the rent in the event of depreciation (or appreciation) in the value of the pound. The draftsman chose the Index of Retail Prices to which to anchor the rent. We do not know whether such escalator clauses are at all common, but it is of interest to note that such a clause came before the High Court of Australia on appeal from the Supreme Court of New South Wales in *Stanwell Park Hotel Co., Ltd.* v. *Leslie* [1952] Australian Law Journal 35. In that case there was an agreement for the sale of a house by instalments, the balance outstanding becoming due on default in payment of any instalment; the purchaser was entitled to make payments on account of the purchase price in addition to the instalments. The purchaser made default and the vendor sued for the balance of the purchase price. There was a provision in the contract of sale for the sums becoming due being varied in accordance with the rise and fall of the Commonwealth Statisticians' Quarterly Summary of Australian Statistics. The case mainly turned on the application of the clause to the particular facts, for the draftsman had not clearly envisaged all the alternatives to which his clause might apply. A point of more general interest was argued: the purchaser contended that he was only liable to pay in all the original purchase price stipulated for, and that the vendor was not entitled to ask more, on the ground that a debtor is entitled to pay a debt by a payment in lawful currency, the face value of which is equal to the amount of that debt. It is not surprising that this contention was given short shrift by the court, which pointed out that the effect of the escalator clause was to vary the consideration. "There is no principle of law preventing parties adopting a fixed figure as the primary monetary expression of a liability and then proceeding to effect a substantive variation of the liability by providing that more or less money must be actually paid according as index numbers evidence a variation of price levels. That is only a method of measuring the actual liability contracted for."

THE INTESTATES' ESTATES ACT, 1952

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It may be recalled that just over two years ago a committee was appointed under the chairmanship of Lord Morton of Henryton to consider the rights of a surviving spouse on an intestacy and the operation of the Inheritance (Family Provision) Act, 1938. That committee reported in July, 1951 (Cmd. 8310). There are many precedents to suggest that that would be the last to be heard of the matter but in the early part of this year a Private Member's Bill was introduced to give effect to the recommendations of the committee and that Bill has now become law as the Intestates' Estates Act, 1952. The provisions of the Act apply on all deaths on or after January 1, 1953.

The primary purposes of the Act are, first, to increase the provision for a surviving husband or wife (*a*), and, secondly, to reduce the numbers of small life interests which arise on intestacies. The Act substantially follows the recommendations of the Morton Committee and its effects may be summarised under four heads :—

1. It varies the scheme of distribution where there is a widow(er).

2. It gives such a widow(er), where he or she takes a life interest, power to have that life interest redeemed.

3. It gives such a widow(er) the right to take a dwelling-house in which he or she has been living in satisfaction or part satisfaction of his or her interests under the intestacy.

4. It amends in some particulars the Inheritance (Family Provision) Act, 1938, and makes that Act applicable on intestacy.

In form the Act proceeds by the convenient method of amending certain sections of the Administration of Estates Act, 1925, and the Inheritance (Family Provision) Act, 1938, and by reproducing in schedules the enactments as amended. Provision for the redemption of life interests is made by inserting a new section (47A) into the 1925 Act : surprisingly, provisions affecting the matrimonial home are not similarly dealt with by a section 47B but are left in Schedule II to the new Act.

(*a*) In the interests of brevity a "surviving husband or wife" will be designated a "widow(er)"; this is uncouth but not much more so than a "surviving spouse."

The importance of the subject to the practitioner is indicated by evidence before the Morton Committee that over 40 per cent. of the estates to which representation is granted are intestate and in this article Part I will deal with the new law of intestacy other than Family Provision and an attempt will be made to set out the whole of the new law as completely as possible in the hope that a practitioner faced with his first 1953 intestacy will be able to gather from it the rights of the parties interested. Part II will deal with Family Provision but as this is a matter less frequently met with it will suffice to indicate the changes introduced by the new Act.

PART I—INTESTACY

The Scheme of Distribution

The complete scheme of distribution is set out in the table on pp. 404, 405, and the following comments may be made upon it.

Where the intestate leave no widow(er) there is no change in the rules governing distribution.

Where the intestate does leave a widow(er) the changes are far-reaching and may be summarised as under :—

1. Where the intestate leave issue the widow(er) takes absolutely the personal chattels and the sum of £5,000 free of duties and costs.

It appears from statistics produced to the Morton Committee that in a normal year no less than 87 per cent. of estates to which representation is taken out are under £5,000 and it is reasonable to suppose that the proportion in the case of intestacies is even higher. It follows that in about nine cases out of ten a widow(er) will take the whole estate to the exclusion of the issue and the number of life interests will be drastically reduced.

2. Where there is no issue the sum of £5,000 is increased to a sum of £20,000 free of duty and costs.

£20,000 is a handsome sum on any view and its handsomeness is increased by the fact that it is free of duty. Assuming there to be no agricultural land an estate of about £24,000 will go entirely to the widow(er). In the case of an estate of £100,000 well over one-third of the net estate will be taken by the widow(er). One cannot but feel that where there is no issue it will rarely be necessary to look beyond the widow(er)—intestacies of £25,000 are not met with every day.

3. Where the intestate leaves one or both parents, or brothers or sisters of the whole blood, or their issue, him or her surviving the widow(er) takes one-half of the residue

DISTRIBUTION OF THE ESTATE OF AN INTESTATE DYING ON OR AFTER THE FIRST DAY OF JANUARY, 1953, LEAVING SURVIVING:—

HUSBAND OR WIFE

And Issue	No Issue		
	ONE OR BOTH PARENTS	NO PARENT BUT BROTHERS OR SISTERS OF WHOLE BLOOD OR THEIR ISSUE WHO ATTAIN ABSOLUTE VESTED INTEREST	NO PARENT, BROTHER OR SISTER OF THE WHOLE BLOOD OR THEIR ISSUE WHO ATTAINS A VESTED INTEREST
Husband or Wife (i) Personal Chattels absolutely. (ii) £5,000 free of duty and costs with interest thereon at 4% payable primarily from income. (iii) Subject as aforesaid, life interest in one-half. *Issue* (i) One-half subject to (i), (ii) and (iii) above on the statutory trusts; or (ii) One-half subject to (i) and (ii) above, but free from any life interest, on the statutory trusts.	*Husband or Wife* (i) Personal Chattels absolutely. (ii) £20,000 free of duty and costs with interest thereon at 4% payable primarily from income. (iii) Subject as aforesaid, one-half absolutely. *Parents* The remaining one-half (subject to (i) and (ii) above) absolutely if one survives or in equal shares absolutely if both survive.	*Husband or Wife* (i) Personal Chattels absolutely. (ii) £20,000 free of duty and costs with interest thereon at 4% payable primarily from income. (iii) Subject as aforesaid, one-half absolutely. *Brothers and Sisters of Whole Blood* The remaining one-half (subject to (i) and (ii) above) on the statutory trusts.	*Husband or Wife* The whole absolutely.

A husband or wife who is deemed to have survived by the Law of Property Act, 1925, s. 184, is not regarded as having survived for the purposes of distribution.

Issue	No Issue	
	ONE OR BOTH PARENTS	NO PARENT
Issue The whole on the statutory trusts.	*Parent(s)* The whole absolutely if one survives or the whole in equal shares absolutely if both survive.	*Brothers and Sisters of the Whole Blood* The whole on the statutory trusts and subject as aforesaid: *Brothers and Sisters of Half Blood* The whole on the statutory trusts and subject as aforesaid: *Grandparents* The whole absolutely if one survives or the whole in equal shares absolutely if both survive and subject as aforesaid: *Uncles and Aunts of the Whole Blood* The whole on the statutory trusts and subject as aforesaid: *Uncles and Aunts of Half Blood* The whole on the statutory trusts and subject as aforesaid: *The Crown, Duchy of Lancaster or Duke of Cornwall* as the case may be takes the whole, but may provide for dependants whether kindred or not of the intestate and for other persons for whom the intestate might reasonably have been expected to make provision.

absolutely instead of a life interest in the whole, and the parent or parents, brothers or sisters or their issue, take an immediate interest in the other half either absolutely or on the statutory trusts as the case may be.

In most cases parents will be considerably better off than before. Usually in the course of nature they die before the widow(er) and so used to take nothing under their reversionary interest.

4. Interest on the sum of £5,000 or £20,000 is allowed at 4 per cent. per annum instead of 5 per cent. as now and is payable primarily out of income rather than capital.

This provision not only tidies up the estate accounts but also avoids the irritating charge to income tax under the Income Tax Act, 1952, s. 170 (the old rule 21 claim).

5. Brothers and sisters of the half blood and their issue, and uncles and aunts whether of the whole or the half blood and their issue, are entirely excluded where there is a widow(er).

The origin of this provision is that the Morton Committee (para. 36) thought that in such circumstances most people would prefer their estates to go to the widow(er) absolutely rather than to some remote relative who may not have been seen for years. One wonders, though, whether the dividing line might not have been placed to include the brothers and sisters of the half blood. In future some peculiar results may occur where brothers and sisters of the half blood have been brought up as one family and almost in ignorance of their true relationship. Be it noted that by the Adoption Act, 1951, s. 14 (1), a child adopted by both spouses is deemed to be of the whole blood with the children of those spouses. It may well be that the ultimate result of the new rule in many cases will be to ensure that the estate goes to remote relatives of the widow(er) rather than to equally remote relatives of the intestate.

6. A widow(er) who is deemed to have survived by the law of *commorientes* (Law of Property Act, 1925, s. 184) is not to be regarded as having survived for the purposes of distribution.

The provision was made the more necessary by the larger amounts now taken absolutely by the widow(er) : without such a provision the larger part of an estate might have been diverted from one side of the family to another by a mere legal fiction.

The Statutory Trusts

The limitations of the statutory trusts for issue are not altered by the new Act and the alterations in those for classes other than issue are largely made as a matter of drafting so that they may

the better dovetail with the new provisions already considered. Since the statutory trusts for classes other than issue are framed by reference to those for issue, a mode of enactment which is never conducive to clarity, and so that this article may present so far as possible a complete picture of the present law, the trusts are briefly summarised below.

ISSUE	CLASSES OTHER THAN ISSUE
In equal shares for the children of the intestate living at his death who attain 21 or (whether male or female) marry under that age.	In equal shares for the members of the class living at the death of the intestate who attain 21 or (whether male or female) marry under that age.
Where any child predeceases the intestate leaving issue living at the death of the intestate, such of those issue who attain 21 or (whether male or female) marry under that age take their parent's share *per stirpes*, so, however, that no issue shall take whose parent is alive at the death of the intestate and thus capable of taking.	Where any member of the class predeceases the intestate leaving issue living at the death of the intestate, such of those issue who attain 21 or (whether male or female) marry under that age take their parent's share *per stirpes*, so, however, that no issue shall take whose parent is alive at the death of the intestate and thus capable of taking.
Subject to contrary intention appearing, advances made to a child must be brought into hotchpot when a share is taken either by that child or by his issue, but an advance made direct to a grandchild or remoter issue need not be so brought in.	No hotchpot.

Statutory powers of advancement, maintenance and accumulation apply, but so that a married infant may give a valid receipt for the income (but not for the capital) of his or her share.

Where there is no widow(er) to take the personal chattels the personal representative may permit any infant contingently entitled to have the use of them on such terms as the personal representative considers reasonable without being liable to account for any consequential loss.

Where no person attains a vested interest under the trusts then that part of the estate which has been held upon trust for those

contingently entitled, together with such accumulated income as has not been applied, shall devolve as though the intestate had died without leaving any issue or any members of the class (as the case may be) living at his death.

Partial Intestacies

The Administration of Estates Act, 1925, s. 49, provided (and still provides) that on a partial intestacy the general rules apply subject to the provisions of the will and subject to the issue of the deceased who take under the intestacy bringing into hotchpot any benefits taken under the will.

It is now provided by section 49 (1) (aa) (*b*) that where a widow(er) takes under the will a benefit other than a bequest of personal chattels the value of that benefit is to be set off against the £5,000 or £20,000 (as the case may be) which he or she takes under the partial intestacy, so that that sum shall be diminished accordingly and interest paid on the diminished figure.

It is provided by section 49 (3) that, where necessary, the personal representative shall employ a duly qualified valuer to ascertain the value of the benefit taken under the will. No specific method of computation is provided for in the case of limited interests, so that the normal actuarial methods of valuation will apply. Of course the usual tables assume a normal state of health; accordingly it is apparently open to a widow(er) to prove a diminished expectation of life to minimise the value of the interest taken under the will.

By section 49 (2) any benefits taken by virtue of the exercise by will of a general power of appointment, including the statutory power to dispose of entailed interests, but not by virtue of the exercise of a special power of appointment, shall be regarded as having been acquired under the will and must be brought into account accordingly. This applies equally to benefits taken by issue or by the widow(er).

As difficulty is sometimes experienced over the provisions for hotchpot on intestacy the matter may for convenience be summarised thus :—

	TOTAL INTESTACY	PARTIAL INTESTACY
Children	Advancements to themselves.	Advancements to themselves. Benefits taken under the will.

(*b*) Unless otherwise stated, references to sections are to the Administration of Estates Act, 1925, as amended by the new Act.

	TOTAL INTESTACY	PARTIAL INTESTACY
Remoter Issue	Advancements to children through whom they claim but not advancements to themselves.	Advancements to children through whom they claim.
		Benefits to themselves under the will.
Widow(er)	None.	Benefits under the will (other than personal chattels) set off against the sum of £5,000 or £20,000 (as the case may be).
Other Persons	None.	None.

Right of Widow(er) to have Life Interest Redeemed

Section 48 (1) of the Administration of Estates Act, 1925, gave to personal representatives power (subject to the consent of the court where the life tenant was sole personal representative) to redeem the life interest taken by a widow(er). This provision is repealed and replaced by a new section 47A which gives the initiative to the widow(er) rather than to the personal representative.

The new section provides, in general, that, where a widow(er) is entitled to a life interest in part of the intestate's residuary estate, he or she is entitled upon the terms and conditions declared to demand that the personal representative shall redeem the life interest and shall pay the costs of the transaction out of the estate. Whereupon, of course, the estate of the intestate may be dealt with free of such interest. The terms and conditions may conveniently be summarised under sub-headings.

The interests which may be so redeemed

It is usually undesirable to realise reversionary interests until they fall into possession and, where the property in which the life interest subsists includes such interests, it is often impracticable and sometimes impossible to redeem the life interest without realising the reversionary interests. Accordingly, the personal representative can only be compelled to redeem if, at the time the demand is made, the whole of the property in which the life interest is enjoyed is in possession; but so that a life interest, partly in possession and partly in reversion, may be treated as

two separate life interests in those respective parts of the property (section 47A (3)). In effect, therefore, the life interest may be redeemed so far as it is in property in possession and left outstanding so far as it is in property in reversion. Furthermore, as there is a time limit upon the exercise of the demand it will not usually be possible to demand redemption of the outstanding part when the reversion falls in.

Where there is a partial intestacy a case may occur in which the deceased bequeathed a life interest in part or all of his estate and does not effectively dispose of the reversion expectant thereon so that he will die intestate as to that interest. The position then may be that the widow(er) is entitled after determination of that life interest to a cash payment and a life interest. Section 49 (4) makes it clear that in such a case the life interest so taken by the widow(er) is expectant upon the determination of the life interest given by the will and so is not redeemable. This position does not seem to be altered by the fact that the life tenant under the will is in fact the widow(er). (See *Re McKee* [1931] 2 Ch. 145.) Of course the increased benefits to be obtained under intestacy may in many cases make it profitable for the widow(er) to disclaim the life interest given by the will. (*Cf. Re Sullivan* [1930] 1 Ch. 84.)

The time within which demand is to be made

The demand must normally be made within twelve months of the date upon which representation is first taken out (section 47A (5)). In considering when a grant was first taken out, a grant limited to settled land or trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account, unless a grant limited to the remainder of the estate has previously been made or is made at the same time (section 47A (9)).

The court, on the application of the widow(er), may extend the period without limit if it is satisfied that the limitation of the period to 12 months will operate unfairly in consequence of :—

(a) the representation first taken out being a probate of a will subsequently revoked on the ground that the will was invalid; or (b) a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out; or (c) some other circumstances affecting the administration or distribution of the estate (section 47A (5)). The object of these provisions is to avoid the sort of difficulty which arose under the Inheritance (Family Provision) Act, 1938, in *Re Bidie* [1949] Ch. 121.

The mode in which demand is to be made

Where the widow(er) is not the sole personal representative the demand for redemption is to be made to the personal representative or, where there are two or more representatives of which the widow(er) is one, to the others. Such notification is irrevocable without the consent of the representative (section 47A (6)).

A widow(er) who is an infant may nevertheless make a valid and binding election to have his or her interest redeemed. In such a case the personal representative shall not pay the capital value to the widow(er) forthwith but shall deal with it in the same manner as with any other part of the residuary estate to which the tenant for life is absolutely entitled. That presumably means that it will be held in trust for him or her until his or her majority and will be subject to the usual statutory powers of maintenance, advancement, etc.

It may be observed that there is no specific provision for the cases where the widow(er) is of unsound mind or defective although such provision is made in the broadly analogous right to acquire the matrimonial home (*infra*, p. 413).

Where the life tenant is the sole personal representative the demand for redemption is to be made by notice in writing addressed to the Principal Probate Registrar. The Act envisages that rules will be made under the Supreme Court of Judicature (Consolidation) Act, 1925, for such notices to be recorded in a register which will be open to the public (section 47A (7)).

The Redemption Value

The price at which the life interest is to be redeemed is to be ascertained by specific rules which are to be found in section 47A (2) which reads as follows :—

1. "There shall be ascertained the annual value of the life interest to which the surviving husband or wife would be entitled if the said part of the residuary estate (whether or not yielding income) were on the date of redemption of the life interest re-invested in [2½ per cent. Consols]."

This provision may be found to produce a pretty crop of problems. If the rule means exactly what it says there is to be a notional re-investment of the fund on the date of redemption. That is to say, the personal representative must notionally throw the whole of the assets on the market that day and notionally apply the proceeds in purchasing 2½ per cent. Consols. So long as the fund is invested in quoted stocks and shares all that is necessary is to look at the selling price of the existing stocks and the buying price

of Consols and allow for brokerage on an " exchange order " basis. But where one of the assets consists of realty or the goodwill of a business or unquoted shares it is a puzzle to know on what basis they are to be valued. If the rule really provides for a notional re-investment on that day the valuation must be on a forced sale basis which is always very much less than a willing buyer–willing seller basis, which itself may be different from the real value. If the Act had provided that the assets were to be valued on a willing buyer–willing seller basis and for the ascertainment of the income which that sum would bring in at the ruling yield on $2\frac{1}{2}$ per cent. Consols things might have been clearer. It may be that a court would decide that that is the proper basis but it is far from certain.

2. " There shall be ascertained the amount which, if invested on the same date in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, would purchase an annuity for the tenant for life of the annual value ascertained under Rule 1."
3. " The said capital value shall, subject to rule 4, be the amount ascertained under rule 2 diminished by 5 per cent. thereof."
4. " If the age of the tenant for life on the said date exceeds eighty years, a further deduction shall be made equal to 5 per cent. of the amount ascertained under rule 2 for each complete year by which the age exceeds eighty :

   Provided that if the effect of this rule would otherwise be that the said capital value was less than one and a half times the annual value ascertained under rule 1 the said capital value shall be one and a half times that annual value".

These three rules do not seem to call for comment.

Since the value of the life interest is calculated by reference to the " date of redemption of the life interest " it follows that the life tenant is also entitled to the income which has arisen on the corpus of the fund between the date of death and that date. It might have made for simpler administration and solved the valuation problems if it had been provided that the redemption was to date back to the date of death and that the " Consols Value " was to be based upon probate values. However it is not so.

What is the " date of redemption " is in the ordinary case not specified. The choice of the actual date seems to lie with the personal representative except only in the case where the life tenant " dies after the exercise of the election but before effect is

given to that election." In that case the redemption date is to be taken as being immediately before the death of the life-tenant (section 49A (4)).

Rights of the Widow(er) as respects the Matrimonial Home

The Administration of Estates Act, 1925, s. 41, empowers a personal representative, whether of a testator or intestate, to appropriate any asset of the estate towards the satisfaction of any interest in the estate. The conditions under which the power may be exercised are, in summary form :—

1. Such an appropriation shall not be made so as to prejudice any specific devise or bequest.

2. Certain consents are to be obtained : if the appropriation is to the satisfaction of an absolute interest, the consent of the person entitled; if towards a settled interest, the consent of the trustees if there are trustees thereof other than the personal representative or if there are not, the consent of the life tenant. Provisions dealing with unusual cases are to be found in section 41 (1) (ii).

3. The personal representative may fix values and for that purpose shall employ a duly qualified valuer, as may be necessary.

4. The personal representative shall have regard to the rights of any persons unborn or unascertained at the time of the appropriation and of any other person whose consent is not required. That is to say the personal representative shall, as it were, represent not only the unborn or unascertained but, in effect, all the beneficiaries other than those mentioned in 2 above.

Broadly, the new Act provides, by Schedule II, that, where the residuary estate of the intestate comprises an interest in a dwelling-house in which the widow(er) was resident at the time of the death, such widow(er) can require the personal representative to exercise the power conferred upon him by section 41 and appropriate the said interest in satisfaction of any absolute interest taken by the widow(er). It will be convenient to consider this provision under sub-headings similar to those used in considering the redemption of life interests. But in the writer's view certain difficulties arise where the widow(er) is sole personal representative (*c*), so that it will be clearer to consider first the case where the widow(er) is either not a personal representative at all or is a joint personal representative.

(*c*) For the solution of these difficulties the writer acknowledges with gratitude the assistance of Lord Mancroft, a practising barrister, who was responsible for the bill in the Upper House.

The property which may be appropriated

It is essential that the widow(er) should have been resident in the dwelling-house in question at the time of the intestate's death. Whether the intestate was also resident there is immaterial.

The right to call for an appropriation is not exercisable where the interest is :—

(a) a tenancy which at the date of the death of the intestate was a tenancy which would determine within the period of two years from that date; or

(b) a tenancy which the landlord by notice given after that date could determine within the remainder of that period (Schedule II, paragraph 1 (2)).

The reason for this provision is to be found in the Morton Report, para. 24, where the view taken is :—

> "We feel that where a house is held on a yearly tenancy or on a tenancy for an even shorter period, the substitution of the surviving spouse as tenant is really a matter for arrangement between the legal personal representatives of the intestate, the spouse and the landlord of the premises. We are also reluctant to make any proposal with regard to the position of the surviving spouse of a statutory tenant for whom existing legislation already affords some measure of protection."

It is provided that, except where the context otherwise requires, reference to a dwelling-house shall include reference to any garden or portion of ground attached to, and usually occupied with, the dwelling-house or otherwise required for the amenity or convenience of the dwelling-house (*ibid.*, para. 7 (1)).

Where part of a building was, at the date of the death of the intestate, occupied as a separate dwelling, that dwelling shall, for the purpose of the schedule, be treated as a dwelling-house (*ibid.*, para. 1 (5)). This is a provision that has an ominous ring of the Rent Restriction Acts about it and it is to be supposed (without enthusiasm) that the law, or lore, as to what constitutes a separate dwelling for one purpose will apply to the other. Be that as it may this provision is to a certain degree qualified by provisions designed to prevent excessive damage to the estate as a whole by severing the dwelling-house for the benefit of the widow(er).

The right to require appropriation shall not be exercisable in the following cases, unless the court, on being satisfied that the exercise of that right is not likely to diminish the value of the

assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders :—

(a) where the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; or

(b) where the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; or

(c) where the whole or a part of the dwelling-house was at the time of the intestate's death used as a hotel or lodging house; or

(d) where a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes (*ibid.*, para. 2).

The time within which demand is to be made

The limit of time within which demand is to be made is exactly the same as that which applies to the right to have a life interest redeemed. It is expressly provided by para. 3 (1) (b) that the right is personal to the widow(er) and is not exercisable after his or her death—a provision which, for obvious reasons, is not necessary in the case of the life interest.

During the period of 12 months during which the application may be made the personal representative may not, without the written consent of the widow(er) sell or otherwise dispose of the interest in the dwelling-house except in the course of administration owing to want of other assets, but this provision has no application where the widow(er) is either a sole or a joint personal representative.

Where there has been an application to the court under para. (2) (*supra*), and the court has found that appropriation would diminish the value of the remainder of the estate, the court may authorise the personal representatives to dispose of the interest within the 12 months. Conversely, as it were, where the court has extended the time in which demand may be made, the court may extend the prohibition.

Finally nothing of the foregoing is to confer any right against a purchaser from a personal representative. One obvious case where this is of value is where the 12 months period runs out and the personal representative forthwith sells : it will then be too late for the widow(er) to apply for an effective extension. Another effect is that a purchaser need not be concerned to inquire whether the interest in the dwelling-house is subject to the widow(er)'s rights.

The mode in which demand is to be made

Where the widow(er) is not sole personal representative the demand is to be made by notice in writing addressed to the personal representatives or, where the widow(er) is a joint personal representative, to the others (*ibid.*, para. 3 (1) (c)). As in the case of redemption of the life interest such notice is irrevocable without consent but the widow(er) may require the personal representatives to have the interest valued and to inform him or her of the result of the valuation so that he or she can better decide whether to require an appropriation. There is no provision to deal with dilatoriness in obtaining a valuation so that the 12 months period runs out in the interim but this would presumably be within section 47A (5) (c) (*supra*, p. 410). Where the widow(er) is a person of unsound mind or a defective the receiver or committee, or if none exists the court, may act on his or her behalf; and where the widow(er) is an infant he or she may act for this purpose as though of full age so that section 41 (1) (2) (b) will not apply.

Valuation and appropriation

The interest in the dwelling-house is to be appropriated in the ordinary way under section 41 and there are no special provisions for its valuation. It will, therefore, be valued in the ordinary way and it is hardly necessary to add that it will be appropriated at its value with vacant possession at the date of appropriation. That is to say, it is immaterial that by the well-known " Chancellor's concession " the Crown is good enough not to exact all the estate duty to which it is entitled.

The interest in the dwelling-house may be appropriated in satisfaction or part satisfaction of any absolute interest of the widow(er) in the estate, and it is provided that such an interest includes the capital value of a life interest which the widow(er) has elected to redeem (*ibid.*, para. 1 (4)).

It is also specifically provided by para. 5 (2) that the interest in a dwelling-house may be appropriated partly in satisfaction of an interest in the estate and partly in return for a payment of cash by the widow(er) to the estate. Para. 5 (1) (of which more will be said later) provides that where the widow(er) is one of two or more personal representatives the rule that a trustee may not be a purchaser of trust property shall not prevent the widow(er) from purchasing from the estate an interest in the dwelling-house.

In the majority of cases the value of the dwelling-house will be less than the £5,000 or £20,000 which the widow(er) will take absolutely so that there will be no need to appropriate towards a

redeemed life interest or for the widow(er) to bring in cash. But in the case of partial intestacies it may be that the widow(er) has taken benefits under the will which have the effect of cutting down the sums taken under the intestacy. Another matter to be noticed in the case of partial intestacies is that the schedule does not override the provision that an appropriation must not prejudice a specific devise although it does override the rights of other persons mentioned in section 41 (5). Hence the widow(er) has no rights in the matrimonial home if it is specifically devised elsewhere.

It is not to be assumed that the Schedule ousts the operation of section 41 as it stands. In circumstances which are within the Schedule the widow(er) can demand that the personal representative appropriate. In other circumstances he or she can request that appropriation be made and it will be made if the personal representative finds himself able to agree. Such an appropriation by request is not confined to interests with more than two years to run, may be made after the expiration of 12 months (providing the personal representative has not assented to himself as trustee) and may be made in satisfaction of settled interests. But, of course, if the circumstances are not within the Schedule the personal representative must have regard to the rights of other persons interested although these are overridden if the case is within the Schedule.

WIDOW(ER) SOLE PERSONAL REPRESENTATIVE

It is obvious that where the widow(er) is sole personal representative it would be an absurdity to provide that he or she should give written notice to himself or herself demanding that he or she should exercise the powers conferred by section 41 in his or her own favour: equally absurd for a widow(er) to give himself or herself written permission to sell the house: for these reasons the provisions of paras. 3 (1) (c) and 4 (4) do not apply to the case where the widow(er) is sole personal representative. Upon a first examination of Schedule II it is rather doubtful whether it applies at all to the case of a widow(er) who is sole personal representative. If it be that it does not, then, of course, the widow(er) could still, subject to what is said below, proceed under section 41 without the aid of the Schedule. But his or her rights under the Schedule are, as has been said, both wider and narrower than those under section 41 alone: wider because the interests of other beneficiaries which are overridden by para. 1 (3) are preserved by section 41 (5): narrower because appropriation cannot be made to a settled share. Hence, it is no mere academic exercise to discover whether the Schedule applies.

Para. 1 does not take the matter very far. On the one hand, if it had been the intention to confine the operation of the Schedule to cases where the widow(er) was not sole personal representative one might have expected it to be made plain: on the other hand, the right which is granted is to " require the personal representative in exercise of the power . . . " and this is not language which is appropriate where the widow(er) and the personal representative are one and the same. Para. 2 does not help. Para. 3 (1) (c) provides that the right shall be exercisable " except where the surviving husband or wife is the sole personal representative, by . . . ." Here is some indication that it is to be exercisable, although not in that particular manner, which is inappropriate, when the widow(er) is the sole personal representative. Similarly, para. 4 (4) provides that " this paragraph shall not apply where the surviving husband or wife is the sole personal representative or one of two or more personal representatives " from which one may infer that the remaining paragraphs do so apply.

When one looks at para. 5 a much more serious objection presents itself. Para. 5 (1) provides: " Where the surviving husband or wife is one of two or more personal representatives, the rule that a trustee may not be a purchaser of trust property shall not prevent [him or her] from purchasing out of the estate an interest. . . ." Is it right to argue that since it appears that this specific authority was required for a joint personal representative to take the interest by way of appropriation then *a fortiori* a sole personal representative cannot appropriate under section 41? This question was rather inconclusively discussed in this journal, Vol. 5, pp. 212 *et seq.*, *and* pp. 287 *et seq.* Briefly, *Re Beverly* [1901] 1 Ch. 681; *Jopling* v. *C. I. R.* [1940] 2 K.B. 282, and *Re Lepine* [1892] 1 Ch. 210, are all cases in which an appropriation has been equated to a sale. On the other hand, Kay J., in *Barclay* v. *Owen* (1889) 60 L.T. 222 (which was cited with approval in *Re Beverly*), said : " It is however well settled that, where an administrator is also one of the next-of-kin, the right to appropriate a part of the intestate's estate for himself as his own share is a right perfectly independent of any agreement with the other next-of-kin "; and in *Re Bythway* (1911) 104 L.T. 411, an appropriation by a widow, a sole personal representative, to herself was found to be invalid, not because she had no power to make the appropriation, but because the property appropriated had no definitely ascertainable market value and, in fact, had not been valued. Williams on Executors, 12th ed., Vol. 2, p. 992, says: " A sole executor who is also a beneficiary cannot appropriate towards his

own legacy or share of residue any securities which have no market value and thus no price"; whilst Lewin on Trusts, 15th ed., p. 293, says: "An executor or trustee may appropriate towards his own legacy or share provided that the property appropriated has a definitely ascertainable or market value and is not appropriated at his own figure."

If it be accepted that these views are correct, what is the explanation of para. 5 (1)? It is probably, although it does not expressly say so, directed to cover the case provided for in para. 5 (2), whereby the personal representative can appropriate the interest in the matrimonial home partly in satisfaction of an absolute interest and partly in exchange for a money payment by the widow(er) to the estate.

There appears, upon the construction of the Schedule, to be some considerable room for doubt as to the precise rights of a widow(er) who is the sole personal representative, but if it be conceded that, on balance, one can gather from paras. 1, 3 and 4 an intention that the Schedule is to apply to such a case then his or her rights seem to be as follows:—

He or she can appropriate under section 41 towards either an absolute or a settled interest, but must first consider the rights of other beneficiaries as preserved by section 41 (5).

He or she can appropriate an interest which is within the Schedule to the satisfaction of an absolute interest which he or she takes under the intestacy without considering the rights of the other beneficiaries.

He or she cannot, on any footing, it is thought, appropriate an interest partly to the satisfaction of a benefit taken under the intestacy and partly in exchange for cash paid into the estate. This sort of transaction, it is thought, must, upon any view, be a sale.

PART II—FAMILY PROVISIONS

Application to Intestacy

The most radical change effected by the new Act is to make the 1938 Act, as amended, applicable to cases of total intestacy, and to resolve doubts as to the extent of its application in cases of partial intestacy. Under the original Act an application by a dependant could be made only where the deceased had made a will: where he had made a will which left some part of his estate undisposed of it was a matter of doubt and difficulty whether provision could be made only out of that part of his estate which passed under the will, or whether it could also be made out of that

part which passed as on intestacy. For a discussion of the difficulties see the Morton Report, paras. 42 to 44. It was obviously desirable that this question should be resolved and it has been resolved by making it plain that provision can be made out of either or both parts of the estate.

It was then necessary to consider whether the Act should apply to cases of total intestacy. On the one hand, if it were to apply to cases of partial intestacy, it was undesirable to bring about a position where it would apply to the whole estate if the deceased died testate as to £10 and intestate as to £9,900, but would not apply at all if he had failed to dispose of the odd £10. On the other hand, there were arguments against its extension to intestacies and these and the reply to them are succinctly set forth in the Morton Report, para. 46. "In the first place it is said that it would be invidious to ask the court to declare that provisions which have been made by Parliament in a statute are unreasonable. This argument rests, in our opinion, upon a confusion between what is reasonable as a general provision of the law suitable to meet the average case, and what is reasonable in the special circumstances of an exceptional case. This may be illustrated by an example. It may be reasonable for Parliament to provide as a matter of general law that a surviving spouse should take the first £5,000 of the estate of an intestate. But it would not be reasonable that a woman dying possessed of an estate of £5,000 and leaving two infant children of her first marriage wholly without means, and a wealthy husband by a second marriage, should leave all her estate to her husband. . . ."

In the case of deaths occurring on or after January 1, 1953, therefore, on an application by a dependant, provision may be made (if the other conditions are satisfied): "If the court is of the opinion that the disposition of the deceased's estate effected by his will or the law relating to intestacy or the combination of his will and that law, is not such as to make reasonable provision. . . ." (section 1 (1)); and further: "the court in considering . . . whether the disposition of the deceased's estate effected by the law relating to intestacy or by the combination of the deceased's will and that law, makes reasonable provision for the maintenance of a dependant shall not be bound to assume that the law relating to intestacy makes reasonable provision in all cases" (section 1 (8)).

RESTRICTIONS ON APPLICATION

It will be recalled that under the old law, by the proviso to section 1 (1), no application could be made where the widow(er)

was entitled to not less than two-thirds of the income of the net estate, and where the other dependant or dependants, if any, is or are a child or children of the widow(er). Subject to drafting amendments that provision remains, so that the position is as follows:—

Where the issue of the deceased are not the issue of the marriage between the deceased and the widow(er), then any of such issue as are dependants within the meaning of the Act may in all cases make application under the Act despite the fact that any provision may be at the expense of the widow(er), their step-father or step-mother.

Where the issue of the deceased are the issue of the marriage between the deceased and the widow(er) (or have been jointly adopted by the deceased and the widow(er)) no application can be made unless the widow(er) enjoys, one way or another, two-thirds at least of the income of the net estate. One object of this provision is to avoid conflicts between parent and child which might have become much more frequent in small estates where the £5,000 taken by the widow(er) exhausts or almost exhausts the estate. In fact it seems that in the cases of total intestacy, where the dependants are the children of the widow(er), there can be no application if the net estate, after payment of estate duty and costs, is under £15,000 or thereabouts. The qualification "or thereabouts" is necessitated by the possible existence of valuable personal chattels.

The Amount of the Provision

Under the original Act maintenance payments were restricted, in that the dependants might not become entitled in all to more than two-thirds of the income where there was a widow(er) and other dependant(s), or more than one-half where there was either a widow(er) and no children or children and no widow(er). Now, in all cases whether the deceased died wholly testate or wholly or partially intestate:—

"Periodical payments . . . to any one dependant shall not be at an annual rate which exceeds the annual income of the net estate, and, where payments are so made to more than one dependant in respect of the same period, the aggregate of the annual rates at which those payments are made shall not exceed the annual income of the net estate" (section 1 (3)).

Further, it will be remembered that a lump sum could only be awarded where the estate was under £2,000, and in awarding such

a sum the court was directed to give effect to the principle of the one-half or two-thirds limit. Now it is provided:—

"Where the value of a deceased's net estate does not exceed five thousand pounds the court shall have power to make an order providing for maintenance in whole or in part, by way of a lump sum payment" (section 1 (4)).

TIME LIMITS UPON APPLICATION

Great difficulty might and did arise under the old Act where a grant of representation had been made and was afterwards revoked: see *Re Bidie* [1949] Ch. 121. Now that the Act applies to intestacies similar difficulties might arise where, after the expiration of six months, some hitherto unknown beneficiaries were discovered. Provision for these contingencies is made by section 2 of the Act, as amended, and generally follows the form adopted to solve cognate problems discussed above. The situation is not one that will arise frequently, and when it does arise reference may be made to section 2 of the Act of 1938 (as amended and reproduced in Schedule IV to the new Act). The provisions appear to be quite clear and do not call for comment.

THE FINANCE ACT, 1952

A Commentary

by

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The Act, which received the Royal Assent on July 9, 1952, contains a wide variety of matter.

In Part I, dealing with *Customs and Excise*, there are changes made in the classification of entertainments and in the rates of duty applicable, with provision designed to deal with the evasion of pool betting duty. Part II, the *Purchase Tax* section, contains measures to implement the recommendations of the Douglas Committee, the " D Scheme." Part III, the *Income Tax* section, again levies income tax at the existing rate of 9s. 6d. in the £, but as against this grants increase in a wide variety of the individual reliefs and allowances, *viz.*: the personal allowance, the child allowance, the earned income allowance, the age allowance, the dependent relative allowance and the reduced rate allowance, and introduces a new relief, to be called the small income relief, designed to assist individuals with incomes of £250 or less who do not receive earned income relief or old age relief; it is, in fact, equivalent to the earned income relief.

Following the report of the Committee on the Taxation of Trading Profits, relief is now given to mining concerns for expenditure incurred on abortive exploration, on machinery and plant used for exploration, on the acquisition of land outside the United Kingdom, and for contributions to public services outside the United Kingdom. Relief is also now available for expenditure in connection with an application for the grant of patent rights which proves unsuccessful.

As regards income taxable under Case III, IV or V of Schedule D, provision is included, essentially consequential on the measures contained in section 21 of the Finance Act, 1951 (now see sections 131 and 134 of the Income Tax Act, 1952), dealing with the acquisition of new or additional sources of income. The present measure is really a " tidying up," but in one instance, that is to say, where a source of income continues to be held after the income therefrom has ceased, can be said to grant relief. Of the other important matters, the " Usher deduction " has now

gone, there is to be no limit of time for the carry forward of loss, and in the case of machinery, plant and patent rights, there are material alterations in the existing law affecting the making of balancing allowances and charges, in particular the decision of the Court of Session in *C. I. R.* v. *West*, 31 T.C. 402, has been nullified.

Part IV, the *Profits Tax* section, is largely a reflection of the Excess Profits Levy section, and the two are to be read together. In view of the introduction of the levy the rates of the profits tax are reduced but the tax can no longer be treated as a deduction in the income tax computation; similar provision is made for the case of management expenses. The rates of remuneration of directors of director-controlled companies are, however, increased.

Part V of the Act introduces the *Excess Profits Levy* which is charged at the rate of 30 per cent. on the excess of profits over the statutory standard, subject to an overriding limit of 15 per cent. of total profits; the tax is charged on businesses carried on by companies only.

In the miscellaneous section, Part VI, provision is made exempting from *Estate Duty* the estates of members of the armed forces dying on active service, after March 12, 1952, where broadly the death is attributable to active service conditions. The decision of the House of Lords in *St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15, that payment in cash for shares is not a transfer of property to a company, is nullified. The rates of *Stamp Duty* applicable upon a conveyance or transfer on sale of property costing less than £3,450 are to be reduced.

For those interested, the sections themselves are dealt with in rather more detail in the succeeding pages.

Income Tax and Surtax

The standard rate of income tax for the year of assessment 1952–53 is to remain unchanged at 9s. 6d. in the £. Surtax is to be charged, in the usual formula, " at such rate as Parliament may hereafter determine," which it normally does in the Finance Act next following (s. 13).

Reduced Rate Relief. Section 220 of the Income Tax Act of 1952 is amended in the following respects:—

on the first £100 tax will be payable at 3s. in the £,
on the next £150 tax will be payable at 5s. 6d. in the £,
on the next £150 tax will be payable at 7s. 6d. in the £.

The corresponding figures for 1951–52 were :

on the first £50 at 3s. in the £,

on the next £200 at 5s. 6d. in the £.

A further amendment provides that a married woman, in receipt of earned income, is to have similar relief, against her earned income (section 14 (1)).

Personal Allowance. By amendment to section 210 of the Income Tax Act, 1952, the rates are increased to—

single person—£120 (formerly £110),

married man—£210 (formerly £190).

The additional earned income relief due in respect of the wife's earned income is also increased to seven-ninths of the income, or £120, whichever is the less (section 14 (2)).

Child Allowance. By amendment to sections 212, 213 of the Income Tax Act, 1952, the rates are increased to—

each child—£85 (formerly £70).

In the case of a child undergoing training the annual amount of emoluments which he might receive without prejudicing the parents' right to the allowance is increased from £13 to £26 (section 14 (3) (4)).

Earned Income and Old Age Relief. By amendment to sections 210 and 211 of the Income Tax Act, 1952, these reliefs are increased—

Earned income relief—to two-ninths, subject to a maximum of £450 (previously one-fifth with a maximum of £400).

Age allowance—to two-ninths where the total income does not exceed £500, with provision for marginal relief (previously one-fifth, otherwise no change) (section 14 (5)).

Dependent Relative Allowance. Section 216 of the Income Tax Act, 1952, as amended in increasing the upper limits placed upon the relative's income, as follows—

Dependent relative's income limit—£135 (previously £130). Where the relative's income is between £85 and £135 the relief is reduced by the amount of the excess over £85 (previously over £80) (section 14 (6)).

Relief for small income (section 15). This allowance is new and effectively extends relief, equivalent to earned income relief, to persons whose income does not exceed £250 a year from all

sources; with provision for marginal relief where the income is between £250 and £350 per annum. The conditions of application are as follows:—

(a) the total income (including that of husband and wife) must not exceed £250, and,

(b) there must be no right, either to earned income relief or old age relief.

Where the conditions are satisfied the relief is given on two-ninths of the income.

Extension of provisions relating to W.R.N.S. to Reserves (section 16). The provisions of P.A.Y.E. and other provisions relative to the taxation of members of the armed forces are extended to the W.R.N.S. Reserve.

Korea gratuity (section 17). Gratuities paid to service men or women in respect of service in Korea are exempted from tax.

Sources of income taxable under Case III, IV or V of Schedule D which are disposed of or cease to yield income (section 18). The tax charged under these cases is as follows: under Case III, upon interest, annuities and annual payments, under Case IV upon income from securities out of the United Kingdom, and under Case V upon income from possessions out of the United Kingdom.

The section provides that subject to certain minor exceptions noted below, the disposal of a source of income or the cessation of the flow of income from that source shall, at least for income tax purposes, have the following consequences:

(a) where there is a disposal of the source on or after April 6, 1952, the income for the final year or period is to be computed on the basis of the sums actually received in that year or period, and the assessment for the preceding year may be increased to the amount of the actual income, if greater than the existing assessment.

If no income arose from the source during the penultimate and final years, the assessments may be similarly adjusted for the last year of assessment when income in fact arose, and for the year preceding that year. This treatment is optional to the taxpayer and is subject to a time limit, since first, a claim must be made within one year after the end of the year of assessment in which the source was disposed of and secondly, must be made not later than seven years after the end of the year in which income last arose from that source.

(b) where the source has not been disposed of but has ceased to yield income for six consecutive years of assessment a claim may

be made for the cessation provision (as at sub-paragraph (a) above) to be applied at the end of those six years, subject to the provision that the claim must be made within seven years from the end of the year of assessment in which income last arose.

It will be noted that a claim may be made by the executors or administrators of a deceased, either if a claim was open to the deceased within the terms of the section, or if the source of income ceased by reason of the deceased's death.

The section is not to apply to the miscellaneous profits from land dealt with in section 182 of the Income Tax Act, 1952, to the small maintenance payments referred to in sections 205 *et seq.*, *ibid.*, nor to the income from investments of the life assurance funds of foreign companies, dealt with in section 430, *ibid.*

Expenditure by mining concerns (sections 19 to 22 and Fifth Schedule). This group of sections gives effect to the recommendations of the Committee on the Taxation of Trading Profits and briefly grant relief to mining concerns in respect of expenditure incurred on the following:—

(a) upon abortive exploration (section 19)—the expenditure must be incurred in search for or in discovering and testing the mineral deposits of any source, must have been incurred on or after April 6, 1952, and must not already be the subject of deduction or relief.

Where these conditions are satisfied and the expenditure was incurred by a person carrying on a trade of working a mine, oil well or other source of mineral deposit, and in connection with that trade, the expense so incurred is to be treated as if it were incurred for the purposes of the trade.

(b) upon machinery and plant used for exploration (section 20)—expenditure incurred upon the provision of machinery and plant for exploration purposes in connection with any mine, oil well or source of mineral deposit is to rank for capital and annual allowances. Thus, the section covers the position where the exploration expenditure ceases before the business begins.

(c) upon the acquisition of land outside the United Kingdom (section 21)—subject to certain expressed restrictions capital expenditure upon the acquisition of land outside the United Kingdom, incurred in connection with the working of a mine, oil well or other source of mineral deposit, worked under a foreign concession, and likely to be valueless when the concession ceases, is to be treated as capital expenditure available for initial and annual allowances under section 306 to 309 of the Income Tax Act, 1952.

(d) upon contributions to public services outside the United Kingdom (section 22)—where these are incurred for the purposes of a trade consisting of or including the working of a mine, oil well or other source of mineral deposit outside the United Kingdom, and take the form of the contribution of a capital sum to the cost of buildings for employees, or towards works for the supply of water gas or electricity to such buildings, or towards works for providing services or facilities for the welfare of employees, and the buildings or works are likely to be of little or no value when the source is no longer worked, then the contribution may be written off over a 10-year period.

Fees and expenses in connection with unsuccessful applications for patents (section 23). The provisions of section 139 and section 320 of the Income Tax Act, 1952, are to extend to fees paid or expenses incurred in connection with an unsuccessful application for a patent, that is to say, such expenditure may be treated either as a deduction in computing the profits of the trader or where no trade is carried on may be the subject of relief from tax.

Amendments as to allowances, etc., in respect of machinery or plant and patent rights (section 24 and Sixth Schedule). Sections 279 *et seq.* of the Income Tax Act, 1952, prescribe the system of relief for capital expenditure incurred upon machinery and plant, by means of initial and annual allowances (and charges), and sections 306 *et seq.*, *ibid.*, for relief for such expenditure incurred upon the purchase of patent rights, in this case by annual allowances only.

The Sixth Schedule contains a series of amendments to these statutory provisions; for the present purpose it will suffice to note the following, which effect radical changes in the law:

(a) that the decision in *C. I. R.* v. *West*, 31 T.C. 402, is nullified and the view of the Revenue now law, hence a balancing allowance (or charge) may be made where the sale of the machinery or plant and the discontinuance of the trade in question are simultaneous;

(b) that the events following may now give rise to a balancing allowance (or charge):

(i) the retention, after permanent discontinuance of the trade, of the machinery or plant in question by the person who previously carried on that trade;

(ii) the sale at less than open market price, or the giving away, of machinery or plant either during the continuance of the trade or after its permanent discontinuance, and,

(iii) in cases where there is a succession to the business in which the plant or machinery was used, but such plant and machinery was not transferred.

These amending provisions are not given retrospective effect and apply only to transactions taking place after the Finance Act, 1952, came into force, that is to say, after July 9, 1952.

As to patent rights

(c) that expenditure incurred after the commencement of the Finance Act, 1952, on the acquisition of future rights in respect of an invention (not then patented) is to be treated, for the purposes of annual allowances to the payer and charges upon the recipient, as if it were expenditure on the purchase of patent rights.

Allowances for building, etc., of tunnel undertakings (section 25). Section 271 of the Income Tax Act, 1952, defines the industrial buildings and structures in respect of which initial allowances, annual allowances (and charges) are to be made, and the effect of the present section is merely to include within that definition buildings or structures in use for the purposes of a tunnel undertaking.

Tied premises (section 26). The House of Lords in *Nash* v. *Tamplin & Sons Brewery (Brighton), Ltd.* [1952] A.C. 231 supported the claim to the "Usher deduction," that is to say, the right of the lessor of tied premises to deduct, in computing his trade profits, the difference between the actual rent receivable from the tenant and the estimated rent which would have been received if those premises had been let on similar terms, but without the tie.

The section withdraws the right to make this deduction.

Removal of limit of time for carrying forward of losses and management expenses (section 27). The provisions of section 342, section 346 and section 425 of the Income Tax Act, 1952, giving relief from loss, are in all cases limited to or by the six-year period following the year of assessment in which the loss is sustained. The present section (by amendment to the sections above referred to) removes the six-year time limit in the following instances:—

(a) where the loss is incurred in the year of assessment, 1952–53, or thereafter,

(b) for any loss incurred in the year 1946–47 or thereafter, not wholly relieved before the year of assessment, 1952–53, and,

(c) in respect of loss incurred before the end of the year 1946–47 if it could have been carried forward to the year 1952–53 by adding in any of the years from 1939–40 to 1946–47 after that in which the loss was sustained, *i.e.*, in effect, where the loss is incurred in 1938–39, or later.

Rents for easements for wires, etc., of radio relay services (section 28). Notwithstanding the prohibition contained in section 137 (n) of the Income Tax Act, 1952, rent paid for an easement for the wires of a radio relay service, may be treated by a person carrying on a trade (which consists of or includes the provision of a radio relay service) as a deduction in computing his profits. If this is done, however, the tax deducted must be returned for direct assessment.

Priority in bankruptcy, winding up, etc., of employer's liability for tax deducted (section 30). Section 33 of the Bankruptcy Act, 1914, gives certain priorities, and amongst these are to be included debts due from any person for income tax deductible under P.A.Y.E. during the 12-months period, preceding the date of a receiving order, in the case of a bankrupt, or the date of death, in the case of a person dying insolvent.

Similar priority is to be given in the case of a company/employer, on liquidation or on the appointment of a receiver.

Profits Tax

Relation of profits tax to income tax rates of profits tax, etc. (section 33 and Seventh Schedule). As from January 1, 1952, the rates of the profits tax are to be reduced as follows :—

(a) the basic rate from 50 per cent. to 22½ per cent.;
(b) the rate chargeable on retained profits from 10 per cent. to 2½ per cent., and,
(c) the rate of distribution charge from 40 per cent. to 20 per cent.,

and the necessary transitional provision is made by the Seventh Schedule.

The section also provides that profits tax may no longer be treated as a deduction in the income tax computation, either for Case I purposes or for those of a management expenses claim.

Increase in certain cases of deductions allowable for directors' remuneration (section 34). The section substitutes a new paragraph 11 for the provision contained in paragraph 11 of the Fourth

Schedule to the Finance Act, 1937. Its effect is to increase the permissible rates of directors' remuneration, in the case of director-controlled companies to the following:—

(a) £2,500, or 15 per cent. of the profits of the chargeable accounting period, which ever is the greater, or,

(b) where for more than half the chargeable accounting period in question there are two or more "working directors," then—

(i) where there are two but not more than two such directors, £4,000,

(ii) where there are three such directors, £5,500,

(iii) where four or more, £7,000.

Note, however, that these figures may be reduced by the operation of the overriding limitation imposed upon the remuneration of individual directors.

The Excess Profits Levy

This levy is charged by sections 36 to 66 and 68, 69, 70 and the Eighth to the Twelfth Schedules inclusive.

These provisions are remarkable for a degree of complexity of expression and application such as the writer, at least, has never encountered in any Taxing Act. It is to be hoped that the rumours as to the early repeal of this measure may indeed have substance, but since it is still on the Statute-book the following general notes upon the incidence and scope of the tax have of necessity been included.

Scope. The charge extends to the profits of all businesses carried on by persons (other than individuals, who are exempt) being either controlled and managed in the United Kingdom, or actually carrying on business here (section 37).

Objects. The object of the Excess Profits Levy is to charge what are termed "the special and extraordinary profits" arising from the present scale of rearmament. The object is achieved in manner followings:—

(i) The average profits of a given period are taken as the standard (the "standard profits") (section 36).

(ii) The given period is to be two of the calendar years, 1947, 1948, 1949, and in certain cases (mainly the Malayan tin-mining and rubber companies) the years 1949 and 1950 (the "standard years") (sections 38, 39).

(iii) By comparison between the standard profits and the profits

of any accounting period subsequent to January 1, 1952, any excess is determined and made subject to the charge of tax at the rate of 30 per cent. (subject, however, to the overriding limit, *infra*) (section 36).

Computation of profits. The basic principle is that profits are computed in accordance with the rules laid down for the Profits Tax, subject, however, to numerous expressed modifications (section 45 and Schedule 9).

Standard profits. The standard profits are arrived at by making certain arbitrary deductions from or additions to the profits of the standard years. The matters giving rise to these additions or deductions fall under three heads:—

(i) increases or reductions in issued share capital (sections 38, 39);

(ii) increases or reductions in borrowed money (section 40) and,

(iii) undistributed profits or over-distributions of profits sections 38, 39).

Minimum standard. The trader may at his option adopt a figure of £5,000, *i.e.*, the "minimum standard" in lieu of a standard based on profits (section 41).

Overriding limit. The tax chargeable for any accounting period is 30 per cent. of the profits for that period, subject to the qualification that at no time shall the total tax levied exceed 15 per cent. of the total profits (as opposed to the excess profits) of the whole period of charge commencing with January 1, 1952 (section 43).

Deficiencies. The amount by which the profits of a chargeable accounting period fall short of the standard profits is termed a "deficiency." Relief is given in respect of such a deficiency either by reducing or repaying the tax charged in respect of any earlier excess or by carry forward and set-off against any future excess (section 42).

Break in continuity. A change in the nature of the trade carried on effects what is termed a "break in continuity" (as do certain other specified events). Deficiencies occurring before such a break cannot be set off against any subsequent excess, and vice versa (section 42).

Groups. In the case of groups of inter-related companies, as defined, the Act requires the group to be treated as a unit for the purpose of assessment and charge (section 49 and Schedule 12).

Transfers. In the case of succession to a business or part of a business provision is made enabling the successor to adopt his predecessor's standard profits (section 47 and Schedule 11).

Miscellaneous and General

Lloyd's and other underwriters; income tax and profits tax (section 67). The Income Tax Act, 1952, by section 480 and the Twenty-First Schedule, provided for the creation of special reserve funds by underwriters, and for the taxation treatment of payments into and out of those funds. The present section increases the maximum limit of the amounts which underwriters may pay into these funds from £1,500 or 25 per cent. of the underwriter's profits to £5,000, or 35 per cent. of such profits, respectively, whichever is the less. The increase is to be effective for the underwriting year corresponding to the year of assessment 1952–53 (and following years).

The general scheme relative to the creation of these reserve funds was based upon the premise that profits tax was a deduction in computing the income tax liability. As from January 1, 1952, that deduction may no longer be made, and as a consequence a measure of relief is to be given to the underwriter by providing for the deduction in computing his total income of the gross equivalent of the profits tax payable by him. The profits tax so "grossed up" which is to form a deduction in computing the total income is the profits tax payable on the profits which are the measure and form the basis of the surtax assessment.

Bodies corporate liable to surtax (deductions for profits tax and excess profits levy) (section 68). The purpose of the section is to permit a deduction of the grossed up equivalent of any profits tax or excess profits levy payable in respect of any chargeable accounting period beginning on or after January 1, 1952, the reason being that from that date no deduction from the statutory income of the company, as computed for income tax purposes, is permissible, either in respect of profits tax or the excess profits levy.

Amendment as to relief for double taxation of profits or income (section 70). The provisions as to the grant of credit for foreign tax whether by way of double taxation agreement or unilateral

relief are to apply as if they directed the appropriate credit to be given first against the levy, next against the profits tax and, lastly, against income tax.

Exemption from estate duty for members of the armed forces, etc. (section 71 and Thirteenth Schedule). The section grants exemption to all property passing or deemed to pass on the death of any member of the armed forces (or any members of the women's forces described in the Thirteenth Schedule), irrespective of rank, provided that death occurred on or after March 12, 1952, and that a certificate is given by the authority specified that the death was the result of injury sustained or disease contracted or aggravated whilst the deceased was a member of a force engaged on active or other service of a warlike nature.

Estate duty (amendments of Finance Act, 1940, Part IV) (section 72). The object of this section is twofold. First, to nullify the decision of the House of Lords in *St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15, where it had been held that a payment of money to a company to procure an allotment of shares was not a transfer of property within the meaning of section 46 of the Finance Act, 1940; this it does. Secondly, to provide a measure of relief in the circumstances following. Section 47 of the Finance Act, 1950 (amending section 51 of the Finance Act, 1940) provided that where the deceased transferred shares or debentures within five years of his death for full consideration in money or moneys worth, the proportion of the company's assets chargeable under section 46 (of the Finance Act, 1940), should be effectively reduced by the amount or value of the consideration received for the transfer, as at the date of sale. The present section covers the position where there has been an increase in the value of the company's assets after the transfer, and reduces, for estate duty purposes, the proportion of those assets deemed to pass on the deceased's death, by the value *at that death* of the shares or debentures transferred by the deceased, if this exceeds the amount or value of the consideration received by him.

STAMP DUTY

Stamp duty on conveyances (extension of relief) (section 73). Section 52 of the Finance Act, 1947, doubled the rate of duty chargeable by the First Schedule to the Stamp Act, 1891, on transactions within the heading " Conveyance or Transfer on Sale." The present section provides (subject to the exceptions noted in

the proviso to subsection (1) *ibid.*) that the increase (by the Finance Act, 1947) is not to apply to any case where the amount of value of the consideration for the sale does not exceed £3,000, and, in cases where the consideration exceeds £3,000 but does not exceed £3,450, is to apply as if the duty were one and one-half times the duty chargeable prior to the Finance Act, 1947.

In the case of voluntary dispositions the amount or value of the consideration is to be taken to be the value of the property, the subject-matter of disposition.

Stamp duties (*exemption for certain transfers to Joint Boards or Joint Committees of Local Authorities*) (section 74). The transfer of water undertakings to Joint Boards or Joint Committees consisting of representatives of Local Authorities, and certain other transfers, are exempted from stamp duty.

POSSESSION AND THE LICENCE TO OCCUPY LAND

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(1) Introduction

Recent decisions of the Court of Appeal, which have suggested that a licensee may have possession of land, make it desirable to restate shortly the traditional view of licences and their relation to possession, so that present developments may be seen in perspective.

Professor F. R. Crane has suggested recently in an interesting article (*ante*, p. 323), that though the word "licence" has been used by the courts to describe the interest of certain persons with "exclusive possession of land," the recent cases have involved not a licence in the traditional sense, but either a new kind of licence (which need not necessarily possess the characteristics of the traditional licence) or possibly a new interest in land. This view, if correct, is entirely consistent with, and indeed bears out, the present submission which is substantially that the traditional licence—and it is only the *traditional* licence which is under discussion here—cannot confer possession on the licensee. It must be admitted, however, that the judges have given no indication that they have considered themselves to be dealing with anything other than a licence in the ordinary sense. Indeed, great emphasis has been placed, especially by Denning L.J., on the proposition that possession of land and a licence, whatever may have been the position in the past, are no longer to be regarded as incompatible, which suggests that it is the traditional licence which was in mind.

(2) Licence by Contract and Licence by Grant

At common law a licence was either bare or coupled with an interest or grant. If bare, it was no more than a permission or authority, personal to the donee, to do something which would otherwise have been unlawful, and was revocable and unassignable. No problem of possession was involved because, the interest being merely personal and not proprietary, it could never be doubted that possession remained in the licensor (see *infra*). In addition, a bare licence seems generally to have been in the nature either of an easement (*e.g.*, a temporary permission not under seal to enter and remain upon the licensor's land for some limited purpose) or

a *profit à prendre* (*e.g.*, a similar permission to remove something from the licensor's land), and in neither case conferred a right to exclusive occupation of the land. Nor would the position seem to have been affected by the Judicature Act, 1873, because the attitude of equity towards possession followed that of the law.

A licence coupled with an interest differed from a bare licence in that it was irrevocable and assignable. The concept is not altogether easy to understand, but "interest" apparently meant an interest either in realty or personalty (*a*). If the former, it had to be an interest known to the common law and granted by deed in accordance with the principle that all grants must be by deed (*b*). If the latter, for example, the grant of a hayrick on the licensor's land (*c*), then no deed would be necessary.

Here again, for the same reason, it seems never to have been doubted that the licensor retained possession of the land, despite the fact that the licensee might enjoy rights of occupation (*d*), though these would, generally, be of short duration and non-exclusive.

The passing of the Judicature Act, 1873, introduced an important development which was reflected in the much criticised but now accepted decision in *Hurst* v. *Picture Theatres* (*e*). By that Act equitable remedies became available in all divisions of the newly created High Court with the result that in a situation substantially similar to that in *Wood* v. *Leadbitter* (*f*) (where the licensee, who had been wrongfully ejected, found himself without remedy, because his interest, if any, was not granted under seal), the court could now hold with confidence that the absence of a deed was not fatal. Provided there was present an agreement to grant the interest, of which specific performance could and would be ordered, the licensee was protected, since the court would act on the principle that equity looks on that as done which ought to be done. The actual reasoning in *Hurst's Case* is not beyond criticism in so far as it purported to regard the question primarily as one of proprietary rights, but it has since been acknowledged by the House of Lords as a correct decision, though rather in terms of contractual rights.

In consequence, a new species of licence, namely, a licence coupled with a specifically enforceable contract, or contractual

(*a*) *Cf. Hurst* v. *Picture Theatres* [1915] 1 K.B. 1, at 7, where Buckley L.J. stated that the "grant" was the right to see the spectacle.
(*b*) *Wood* v. *Leadbitter* (1845) 13 M. & W. 838.
(*c*) *Wood* v. *Manley* (1839) 11 Ad. & E. 34.
(*d*) As to the distinction between possession and occupation, see *infra*.
(*e*) *Supra*.
(*f*) *Supra*.

licence as it is called, has in recent times assumed increasing prominence and importance, to which further emphasis has been added by the decision of the House of Lords in 1948, that such a licence, though unconnected with any interest, cannot be revoked otherwise than in accordance with the terms, express or implied, of the contract (*g*).

It is here that the problem of possession has arisen. For unlike its predecessors, the contractual licence to occupy land, conferring as it does, rights of exclusive occupation which may endure for some length of time, is in the nature of a lease or tenancy. Formerly, the question whether a person were in occupation of land by virtue of a licence or short periodic tenancy (or tenancy at will) was not of great consequence to an owner of land, since both could be determined at short notice and the occupier could not claim security of tenure. With the coming into force of the Rent Restriction Acts, however, it has become of vital importance to distinguish a licence from a lease because, whilst the former is not within the scope of the Acts, the latter is. Since the test of whether possession has been conferred or not has hitherto been regarded as reliable for this purpose, it is relevant to know whether this is still the case, or whether a licence and possession are in fact compatible.

(3) Security of Tenure and the Licensee

In 1948 the nature of a licence may generally be said to have been clear. It was still regarded as being no more than a personal privilege, even when coupled with an interest, but through the fusion of law and equity the technical common law rule relating to the latter had been modified so as to produce a position of substantial justice.

Since 1948, however, the increasing impact of the Rent Acts on modern life, together with an acute housing shortage, and a certain looseness of terminology, have combined to render the nature and effect of licences far less certain than they were formerly. In some cases the court has been faced with the somewhat paradoxical situation in which a person, whilst having a right to exclusive possession of premises, ought not to be considered as having a tenancy which would attract the Rent Acts with all their implications. An apparent way out of this impasse has been found by treating such a person as a licensee (his licence usually being irrevocable), which, it is held, protects his possession whilst denying him the security of the Rent Acts.

(*g*) *Winter Garden Theatre* v. *Millennium Productions, Ltd.* [1948] A.C. 173.

The beginning of this recent development is marked by *Foster* v. *Robinson* (*h*) where a tenant, as the result of agreement with his landlord, occupied premises rent-free for the rest of his life. He was held to be a licensee, his licence being irrevocable during his life in accordance with the terms of the agreement. The Court of Appeal evidently regarded the licence as contractual, though Denning L.J. subsequently demonstrated that in fact there was no legally enforceable contract supported by consideration (*i*). If this view be correct, it appears, first, that a licence not coupled with a contract in the legal sense was held to be irrevocable, and secondly, that exclusive possession did not negative the possibility of a licence (though from the circumstances of the case it seems probable that the "licensee" had rights of occupation only).

Shortly afterwards, in *Marcroft Wagons* v. *Smith* (*k*) the Court of Appeal took the matter further. A was at his death a statutory tenant of controlled premises. His widow (as she was entitled to do by virtue of section 12 (i) (g) of the Rent Restriction Act of 1920) continued in occupation until her death in 1951, whereupon her daughter requested a transfer of the tenancy to herself. This the landlord refused, on the ground that the house was required for one of his employees. He indicated, however, that he did not wish to disturb her, and accepted two weeks' rent. The daughter remained in occupation, paying rent, for about six months, at the expiration of which time the landlord sued her for possession. It was contended on behalf of the daughter, that in view of her exclusive possession of the premises, she must have a tenancy of some sort (being either a tenant from week to week, or at will), but the Court of Appeal refused to accept this proposition. In the opinion of the court, it is possible under modern conditions for an occupier of land to have possession without any interest in the land. Evershed M.R. explained the position in these words (*l*) :

"But it is now quite clear that, to use the formula which has before been applied, a new *monstrum horrendum, informe, ingens* has come into our ken—the conception of a statutory tenancy, the conception that a person may have such a right of exclusive possession of the property as to entitle him to bring an action of trespass against the owner, but yet that such right would not confer any interest whatever in the land on the occupier who would not be able to dispose of it by grant or testamentary disposition."

Acting on the apparent precedent of the statutory tenant, the court held that the daughter though (seemingly) having possession,

(*h*) [1951] 1 K.B. 149.
(*i*) 15 M.L.R. 1.
(*k*) [1951] 2 All E.R. 271.
(*l*) *Ibid.*, at 274.

was a mere licensee with no interest in the land. The Master of the Rolls was careful, however, to confine his observations on possession to the case of a tenant holding over after the termination of his tenancy, and not to venture any statement of general principle (*m*) :

" I think that where the question arises out of a new relationship between the owner of property and an occupant, the inference to be drawn when the occupant is first allowed to go into exclusive possession is prima facie very different from the inference proper to be drawn, though not necessarily to be drawn, in a case such as this, where the person in occupation has lived on the premises . . . for a long period of time and has in effect succeeded to the occupational privileges (to use a somewhat colourless phrase) possessed by her parent on that parent's death."

Even so, it is questionable whether the analogy of a statutory tenant is sound. If such a tenant has possession of land—and this is scarcely to be doubted— then it is impossible to say that he has no interest in the land. Undoubtedly, his interest is of a special kind, being the creature of, and governed by, statute and as such may not possess all the characteristics generally associated with interests in land (it is, for example, personal and inalienable) but in the present submission, it must be, none the less, an interest in land.

Subsequently, the Court of Appeal gave further consideration to the nature of a licence in *Errington* v. *Errington* (*n*). The facts were these : a father desiring to benefit his daughter, purchased a house with the assistance of a loan from a building society, the conveyance being taken in his name. He gave the deposit to his daughter as a present and told her with regard to the balance that if she repaid to the building society the monthly instalments of principal and interest as they fell due, the house would be hers when the mortgage was discharged. Thereupon the daughter and her husband entered into occupation and lived in the house for some nine years, during which time they made regular repayments to the building society. Before the mortgage was discharged, the father died, having by will devised the house to his wife. The Court of Appeal held that the daughter was a contractual licensee with an irrevocable licence so long as the instalments continued to be paid. Moreover, her right to remain in occupation was valid against everyone save a bona fide purchaser of the legal estate for value without notice. It is not easy to see how such a person

(*m*) *Ibid.*, at 275.
(*n*) [1952] 1 All E.R. 149.

could exist, since it is incumbent upon a prudent purchaser to inspect property which he is purchasing, and this would inevitably disclose the occupation of a third party such as the daughter. It follows that the licence was in effect a *jus in rem*.

(4) Contract, Possession and Occupation

These cases last mentioned raise serious problems, undoubtedly the most important of which is the relationship between a licence and possession.

First, the heresy is perpetuated that a licence and possession are not inconsistent. It has been seen that in *Marcroft Wagons* v. *Smith* (*o*) the Master of the Rolls expressly stated the view that a person may enjoy possession of land and yet have no interest therein. Again, in *Errington* v. *Errington* Denning L.J. was clear that whatever may have been the position in the past, the test of possession can no longer be regarded as reliable to distinguish a lease from a licence. This was also emphasised by the learned Lord Justice in *Cobb* v. *Lane* (*p*) and *Bendall* v. *McWhirter* (*q*). Now, it is submitted with great respect that here lies the root of the confusion. To say that a licence—a mere personal permission to do something which would otherwise be unlawful—may confer possession is to upset something which is fundamental in English law.

To avoid misunderstanding (for difficulties of terminology are notorious in this subject), it may be mentioned at the outset that the term " possession " is used throughout this article to mean what Pollock and Wright describe as " possession in law," namely, " the fact of control coupled with a legal claim and right to exercise it in one's own name against the world at large " (*r*). It is to be distinguished from occupation, which implies only the fact of control without the necessary element of intention (*s*).

We begin with the premise that possession is itself a substantive right or interest in the nature of property, which, again in the words of Pollock and Wright, is " valid against all merely extraneous intrusion . . . a possessor acting as owner has not only a personal interest but a title which is effective against all outsiders, and enures to the benefit of all who may hereafter be able to show a title derived from it by any form of bequest, devolution, or conveyance, appropriate to the nature of the subject-matter " (*t*).

(*o*) *Supra*.
(*p*) [1952] 1 All E.R. 1199.
(*q*) [1952] 1 All E.R. 1307.
(*r*) Possession in the Common Law, p. 16.
(*s*) The terms " possession " and " occupation " are, it is thought, less likely to encourage confusion than the terms " possession in law " and " possession in fact " which are frequently met with.
(*t*) *Op. cit.*, p. 23.

Moreover, a possession which, in its inception is wrongful and unlawful, confers on the possessor a right which will be protected. It follows that a person who has possession of land cannot have the status of a mere licensee whose interest is strictly personal and non-proprietary. Indeed, it is precisely the test of possession which has consistently been used to differentiate between a licence and a lease, because for centuries, even before the assize of novel disseisin, which, however, emphasised its importance, possession has been the foundation of proprietary rights in English land law (*u*).

A person with possession of land has always had of necessity an interest in the land, being at the lowest tenant at will (*a*). The so-called possession by a servant of premises belonging to his master, which he is required by the latter to occupy for the performance of his duties, is nothing more than the right of occupation and creates no tenancy between the parties (*b*).

At the same time, it is clear that a licensee, though having no proprietary interest in the land, may enjoy rights of occupation, that is, something less than possession. It would, for example, be difficult for a visitor to a theatre or cinema to have anything less than exclusive occupation of his seat! And if I lend my house to a friend for two weeks whilst I am away on holiday, it seems clear that he is a licensee with the right of exclusive occupation (*c*).

Again, it may be mentioned that in the celebrated case of *Taylor* v. *Caldwell* (*d*) an agreement to take a Music Hall and Gardens for four days, for the purpose of giving concerts in the hall and day and night fêtes in the gardens, was held to be a licence. The licensees were to have exclusive occupation during that time, but the owners were to retain possession.

And in *Smith & Son* v. *Lambeth Assessment Committee* (*e*), which concerned the letting of a bookstall on a railway platform, it was held that the railway company did not part with possession of any part of their station, but merely conferred on Smith's, who were their licensees, an exclusive right of occupation (*f*).

The answer may be—and indeed it is rather to be hoped that it is—that the distinction between possession and occupation, which

(*u*) For a discussion of the meaning and importance of possession see Pollock and Maitland, History of English Law, Vol. II, pp. 29 *et seq.*

(*a*) See Parke B. in *Doe* d. *Tomes* v. *Chamberlaine* (1839) 5 M. & W. 14, 16.

(*b*) *R.* v. *Stock* (1810) Russ. & Ry. 185; *R.* v. *Snape* (1837) 6 Ad. & El. 278.

(*c*) *Moss* v. *Brown* [1946] 2 All E.R. 557.

(*d*) (1863) 3 B. & S. 826.

(*e*) (1882) 10 Q.B.D. 327.

(*f*) This was a rating case, and though the actual decision was that Smith's did not have exclusive occupation (as compared with exclusive use) for rating purposes, it is submitted that they had exclusive occupation within the meaning above. The decision was overruled in *Westminster Council* v. *Southern Ry.* [1936] A.C. 511, but this point remains unaffected.

was brought out clearly by Channell J. in *Lynes* v. *Snaith* (*g*) ("As to the merits, I think it is clear that the possession here was that of the occupier and not the owner."), has escaped the Court of Appeal, and that when it is said that a licensee may have possession of land, the court in fact means occupation, though one would hesitate before coming to such a conclusion. This would undoubtedly bring the cases into line with traditional ideas about licences and possession, though it would by no means dispose of all the difficulties; the licensee, for example, having only occupation, would be left without direct, and possibly any, remedy against a trespasser.

The second problem is that in *Errington* v. *Errington* it is doubtful whether there was a valid contract between father and daughter at all, since it was emphasised by the court that the agreement did not impose on the daughter any obligation whatever to pay the mortgage instalments. Indeed, had there been a valid contract, solution of the case would have been simple on the ground that the personal representative of the deceased father could not escape the contractual obligations of the testator. If this be so, the licence was not contractual, and yet held to be irrevocable.

Thirdly, since in *Errington* v. *Errington* it seems probable that the daughter had possession of the house, the inference is raised that she had an interest in the land. At the same time it is equally clear that she was neither a tenant for years nor at will, though her right was equivalent to a right *in rem*, so that we are left with the intriguing speculation whether a new equitable interest in land is in process of evolution or not (*h*). The one thing which is clear is that the daughter could not have had the status of a mere licensee in the traditionally understood meaning of the term.

If it is going too far to say that the daughter had a new interest in land, then what were her rights? Once the mortgage debt had been discharged, her rights would no doubt have been subrogated in equity to those of the mortgagee, though even then the legal estate would not have vested in her, but until that moment, in the absence of any interest in land or valid contract (*supra*), it is submitted that her rights extended only to a charge on the property to secure the deposit plus all moneys which she had repaid to the building society. It may be objected that such a view would involve the daughter in hardship, but it is questionable whether

(*g*) [1899] 1 Q.B. 486 at 489.
(*h*) See 15 M.L.R. at 236.

this would be so. Doubtless, it would be more beneficial to have the house than the money, but as against that the daughter had had the advantage of living in the house for nine years at no cost to herself. Had there been some document in writing, the father's action might have been construed as an express declaration of trust in favour of his daughter, but in the circumstances that was impossible. The doctrine of part performance would appear to have no application to section 53 of the Law of Property Act, 1925, in the absence of a contract for valuable consideration of which specific performance may be ordered. Difficulty may often arise when the court is faced with a situation of potential hardship, and has to deal with sections, such as sections 40 and 53 of the Law of Property Act, 1925, which are mainly evidentiary, but it must be remembered that a person's legal rights depend on, and must be measured by, the state of the law at any given moment. Human frailty and draftsmen being what they are, it is almost inevitable that some injustice will occur.

(5) The Wife as Licensee

Mention should also be made of the "deserted wife" cases, one of the latest of which is *Bendall* v. *McWhirter* (*i*). Lamentably, the situation is not uncommon today in which a husband has deserted his wife, leaving her living in the matrimonial home which, in law, belongs to him. This in fact happened in *Bendall* v. *McWhirter* with the added complication that the husband became bankrupt, whereupon his trustee brought an action for possession of the house, which was resisted by the wife. The main question for decision was whether the wife's right or interest was capable of determination by the husband, as it was conceded that the trustee could be in no better position. She was held to be a licensee with a special right to remain in the matrimonial home until excluded by an order of the court under section 17 of the Married Women's Property Act, 1882. Her right would also have been lost, presumably, on the authority of *Thompson* v. *Earthy* (*k*), by a sale over her head to a purchaser without notice. Her position, apart from the mode of termination, was therefore assimilated to that of a contractual licensee.

Two points are particularly interesting. First, it is now to be taken as settled law that a deserted wife has a right to remain in

(*i*) *Supra*.
(*k*) [1951] 2 K.B. 596; and see Denning L.J.'s remarks in *Lee* v. *Lee* [1952] 1 All E.R. 1299 at 1301.

the matrimonial home until excluded by an order of the court under section 17 (see, for example, *Hutchinson* v. *Hutchinson* (*l*), *Stewart* v. *Stewart* (*m*), and *Lee* v. *Lee* (*n*)). The reason is one of procedure rather than of substantive property rights, for section 12 of the Married Women's Property Act, 1882, provides that: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including the husband, the same civil remedies . . . for the protection and security of her own property, as if she were a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The effect of this section is that although the wife is a mere licensee with no interest in the land, a husband, as the legal owner, is disabled from suing her for possession of the matrimonial home, because that in substance is an action in tort. At the same time he is not left entirely without remedy, for section 17 lays down expressly a procedure for deciding questions between husband and wife as to possession of property, though any order under this exception is wholly within the discretion of the court.

The only case which is not consistent with this view is *Bramwell* v. *Bramwell* (*o*), a decision of the Court of Appeal, which is not easy to understand. In that case an order for possession of the matrimonial home was made in favour of a husband who had deserted his wife, notwithstanding that the proceedings were in the form of an ordinary action for possession and not an application under section 17. Goddard L.J. (as he then was) alone referred to the procedural difficulty mentioned above, but, curiously enough, regarded it as unnecessary, in the circumstances before him, to decide the question, and agreed in terms with the order made.

It is clear that the Court of Appeal in the later case of *Pargeter* v. *Pargeter* (*p*) had some difficulty in understanding *Bramwell* v. *Bramwell*, and in the event found themselves unable, in substantially similar circumstances, to take the same course. Though the decision in this later case is a little obscure, the court appears to have been of opinion that the only course open to a husband who wishes to obtain possession of his house from his wife is to proceed under section 17.

In view of the clear words of section 12 of the Married Women's Property Act, 1882, it seems that *Bramwell* v. *Bramwell* can only stand as an anomaly, depending perhaps (from the remarks

(*l*) [1947] 2 All E.R. 792.
(*m*) [1948] 1 K.B. 507.
(*n*) [1952] 1 All E.R. 1299.
(*o*) [1942] 1 K.B. 370.
(*p*) [1946] 1 All E.R. 570.

of Goddard L.J.) on its particular facts, and must not be taken as detracting from the general exclusive operation of section 17 which has been accepted in a subsequent line of cases.

Secondly, the notion that a deserted wife is the licensee of her husband is not entirely new (see, for example, Lord Greene M.R. in *Brown* v. *Draper* (*q*): "[the wife] cannot in her own right claim the protection of the [Rent Restriction] Acts since she is not the tenant but a mere licensee,") though at one time even this was denied by Denning L.J. himself (*r*). This does not necessarily support the view that a licence is compatible with possession. For it is clear that the wife does not in fact have possession (*s*), but that her husband retains possession through her. There is therefore no breach of principle so far as the immediate parties are concerned, though the wife, since she is denied possession, is placed in an invidious position as against trespassers.

The same, it is submitted, is true of the other class of cases relied on by Denning L.J. in *Errington* v. *Errington* (*t*), namely the "requisition" cases (*infra*).

(6) Licensees of Public Authorities

Wartime evacuees or air-raid victims who are placed by a requisitioning authority in requisitioned premises are, apparently without exception, regarded as licensees, possession remaining in the authority. Though ultimately the question may well be one of construction of the particular statute under which the requisitioning powers are derived, it seems clear in the three cases cited by Denning L.J. that possession did not pass to the licensees.

In *Ministry of Health* v. *Bellotti* (*u*) evacuees from Gibraltar were in occupation of premises at an evacuees' centre under licences from the plaintiff, who had requisitioned the premises under Defence (General) Regulations, 1939. The licences having been revoked, and the defendants having refused to leave, the Minister of Health brought an action for possession. The Master of the Rolls said (*a*): "In the present case, under the very language of the Emergency Powers (Defence) Act, 1939, the possession is to be taken by the Minister on behalf of the Crown and this, therefore, is a case where the Minister of Health, being in possession

(*q*) [1944] K.B. at p. 314.
(*r*) *Old Gate Estates* v. *Alexander* [1950] 1 K.B. 311 at 319.
(*s*) *Brown* v. *Draper* [1944] K.B. 309 *per* Greene M.R. at 312. *Old Gate Estates* v. *Alexander* [1950] 1 K.B. 311 *per* Bucknill L.J. at 317.
(*t*) *Supra* at 154.
(*u*) [1944] K.B. 298.
(*a*) At p. 303.

on behalf of the Crown, is entitled as Minister and by that name to enforce the rights of the Crown as the party in possession."

Again, in *Southgate B. C.* v. *Watson* (*b*), a house was requisitioned by the local authority who let an air-raid victim into occupation. The county court judge held that the Council were in possession of the house by virtue of powers granted to them by the Minister of Health under the Defence (General) Regulations, 1939, and his judgment was affirmed by the Court of Appeal.

Thirdly, in *Ministry of Agriculture and Fisheries* v. *Matthews* (*c*), another case of requisitioning under the Defence Regulations, it was held that since the Minister had no interest in the land apart from possession, he could only grant the right of occupation.

The position of such persons accommodated by local authorities under the Defence Regulations differs from that of those who ordinarily occupy council houses. The latter are full tenants, not mere licensees, but it is of great practical importance to notice that the effect of the statutory provisions, namely the Housing Act, 1936, ss. 83 (1) and 156 (1), as amended by the Housing Act, 1949, First Schedule, is to exclude such tenancies from the fetters of the Rent Acts where the local authority seeks possession of the house in exercise of its powers of management (*d*) (which include the replacement of one tenant by another).

(7) Licences and Conveyancing

It is an interesting question whether a licence to occupy land is registrable under the Land Charges Act, 1925. If it is, it will be void against a purchaser of the land affected unless registered in the appropriate register (*e*).

Where the licence is contractual, it is possible that it may be registrable as an estate contract, provided the contract is "to convey or create a legal estate . . ." within the meaning of section 10 (1), Class C (iv), of the Land Charges Act, 1925. It is unlikely that this will often be the case, though *Errington* v. *Errington*, assuming there to have been a contract at all, would provide a recent example.

Where there is no contract, there would seem to be nothing capable of registration within section 10 of the Land Charges Act, 1925, and so no question will arise under section 13 of the Land Charges Act, or section 199 of the Law of Property Act, 1925. Moreover, section 14 of the Law of Property Act, 1925, protects

(*b*) [1944] K.B. 541.
(*c*) [1950] 1 K.B. 148.
(*d*) *Parry* v. *Harding* [1925] 1 K.B. 111; *Shelley* v. *L. C. C.* [1949] A.C. 56.
(*e*) L. C. A., 1925, s. 13; L. P. A., 1925, s. 199.

the interest of any person in possession or actual occupation of land, a section which though limited to Part I of the Act would seem to imply that such an interest, not being registrable, will be protected, In *Lewisham B. C.* v. *Maloney* (*f*), it was held that the words " right or privilege over or affecting land " in section 10 (1), Class D (iv), have a restricted meaning *ejusdem generis* with the word " easement " and do not extend to include the right of occupation arising on the exercise of powers of requisitioning under the Defence Regulations, and therefore, that right does not require to be registered as a land charge to be valid against a purchaser of the land. If this be the true position so far as non-contractual licences are concerned, it is paradoxical that a licensee in occupation of land without a contract is in a stronger position than a lessee whose long lease is under hand, and a person with an option to purchase, both of whom are required to register their interests (section 10 (1), Class C (iv)).

So far as registered land is concerned, it is at least arguable that a licensee in occupation has an overriding interest which will bind the registered estate without entry on the register. Land Registration Act, 1925, s. 70 (1) (g), includes within the list of overriding interests " The rights of every person in actual occupation of the land . . . ." There is no reference to such person having any " interest " in the land (which would exclude a licensee), and it is submitted that a licensee in actual occupation will be protected (*g*).

(8) Conclusions

The following conclusions, it is submitted, may be drawn :

(i) If the nature of a licence is not to become inextricably confused with proprietary interests in land, it must be clearly understood that a licence in the traditional sense cannot confer possession on the licensee, though it may give rights of occupation.

(ii) The new interest of a person with " exclusive possession of land," which does not amount to a tenancy falling within the Rent Restriction Acts, cannot be a licence in the traditional sense, and ought, in the interest of clarity of thought, to be given a new name. As Roxburgh J. put it (*h*) : " How this interest of the occupant ought in these circumstances to be described I do not know. It would, I think, be a pity to call it a licence, because that word has, in connection with landlord and tenant, already been appropriated to quite different situations."

(*f*) [1948] 1 K.B. 50.
(*g*) See Potter, Principles of Land Law under the L. R. A., 1925, 2nd ed., p. 40.
(*h*) *Marcroft Wagons* v. *Smith* [1951] 2 All E.R. 271 at 277.

(iii) The position of the deserted wife is sufficiently protected against her husband by treating her as a licensee with a special right to remain in the home, and this does not involve any breach of principle since she does not have possession. Her position *vis-à-vis* third parties is less satisfactory. The same is true of the "requisition" cases.

A return to the strict distinction between licence and possession, and the restoration of the test of possession to distinguish licence and lease, would undoubtedly help to clarify the present confused position. And whilst recognising the need for development to meet modern conditions, it would allow such development to proceed in harmony with established principles.

LIABILITY FOR DRY ROT

By J. B. Sweetman, ll.b., Solicitor

Wartime readers of this journal will recall the article by " Archilex " which appeared in the issue of December, 1943 (Vol. 8, pp. 93 *et seq.*) on the subject of liability for dry rot. That article was confined mainly to an exposition of the potential liability of a landlord to third parties arising from the existence of dry rot on his premises, which was very much to the point in those days when many houses were left damaged and untenanted, and hence damp and unventilated—ideal conditions for the spread of the fungoid growth which is the basis of dry rot. It is interesting now to look back and to realise that, at the time, this clearly appeared to be a temporary wartime problem which, like so many others, would inevitably decrease rapidly in importance when hostilities ceased and the world returned to normal. Unfortunately, however, whatever the reasons, this problem has in fact not only failed to disappear in the seven years that have passed since the War, but the rot has very literally spread. One can to some extent judge the practical importance of the matter to the present-day purchaser or tenant from the number of cases concerning dry rot which have been reported in the last four years. Moreover, a surveyor lecturing to the Chartered Auctioneers and Estate Agents' Institute on the " Surveying of Buildings," after pointing out that dry rot is " like a wasting disease which, unless it receives prompt and efficient treatment, will eventually destroy every timber in the building," added: " Before 1914, to find it when surveying a building was less frequent than today. Nowadays it is quite usual. In fact, there are certain areas, particularly in London, where it is so prevalent that if I do not find it at the first attempt I go back and have another look." (*Estates Gazette*, April 19, 1952.) And for those who prefer to rely on Government publications there is an interesting Report of the Committee on the Regent's Park Terraces, 1947 (Cmd. 7094) which is much concerned with dry rot.

It is proposed to discuss the question of liability for dry rot in the three aspects which seem to be of most topical importance: (1) as between landlord and tenant; (2) as between vendor and purchaser; and (3) as concerning professional adviser and client. For liability to third persons, the reader can do no better than to refer to the article mentioned above.

Liability as Between Landlord and Tenant

The relationship of landlord and tenant being essentially contractual in character, it is not possible to lay down rules of general application on this question of liability. It is not regulated by any undisplaceable statutory or common law rule or presumption, and it is perfectly possible for the lease or tenancy agreement to cast the burden (as between the parties) clearly on one or the other of them. What must be attempted is to allot the responsibility where there is a covenant for repair in what may be regarded as one of the usual forms (the actual form of words — " in good tenantable repair," " in good and substantial repair " or simply " in repair " —makes little difference), and to consider how (if at all) the position differs if there is an exception from the covenant of " fair wear and tear " or an exception in similar words. It will be assumed for the sake of simplicity that the covenant is by the tenant; but the same principles apply when the covenant is by the landlord *mutatis mutandis*.

Anyone who has made a study of the law of landlord and tenant will be familiar with the lack of convincing authority on points which appear to have been likely to crop up continually over the centuries. A good example is the meaning of " fair wear and tear," to which reference will shortly be made. In *Taylor* v. *Webb* [1937] 2 K.B. 283, which is now the *locus classicus* on this point, Scott L.J. said: —

> " Strange as it may seem, this common exception in repairing covenants in leases, ' fair (or reasonable) wear and tear excepted ' has never come up for judicial consideration in either the House of Lords or Court of Appeal, although it has of course, often been considered and applied in courts of first instance."

It would seem, therefore, almost too much to hope for a direct authority on the subject of liability for dry rot under a tenant's general covenant for repair, and it is remarkable that even the post-war period has failed to produce any such authority. One must accordingly descend to general principles and attempt to apply them —there is no " rule of thumb." Perhaps the best description of the tenant's obligation under a covenant in general form (in that case, " in good tenantable repair ") was given by Lopes L.J. in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42. It is to keep the premises in " such repair as, having regard to the age, character and locality of the house would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it." It must at once be added that on the authority of *Payne* v. *Haine* (1847) 16 M. & W. 541, a covenant " to keep and leave " in

repair means that the tenant must *put* the premises into repair if they are not in repair when the tenancy begins (see also *Proudfoot* v. *Hart, supra*); but this obligation to *put* the premises into repair is not quite as wide as might appear on first sight, since it is just as strictly qualified as the obligation to *keep* the premises in repair under the test laid down by Lopes L.J. The tenant is not bound to make a new and different thing from that demised. As Fletcher Moulton J. said in *Lurcott* v. *Wakely* [1911] 1 K.B. 905—

> "Now what is the meaning of keeping old premises in good condition? I can see no difficulty in deciding the meaning of that. It means that, considering that they are old premises, they must be in good condition as such premises."

A more recent explanation of the tenant's obligations is contained in the following passage from the judgment of Slesser L.J. in *Pembery* v. *Lamdin* [1940] 2 All E.R. 434 (C.A.), at p. 437, a case in which the covenant (by the landlord) was to keep in good tenantable repair the external walls of an old house which had admittedly been built without any provision for waterproofing and was therefore (not surprisingly) damp.

> "What was the nature of the obligation to repair? In order to ascertain that, it is first necessary to consider the nature of the premises which had to be repaired under the covenant. . . . In *Lister* v. *Lane and Nesham* [1893] 2 Q.B. 212, after reviewing the earlier authorities, Lord Esher M.R., who was speaking there of a tenant, says at pp. 216, 217: 'Those cases seem to me to shew that if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he takes; he is not obliged to make a new and different thing' . . . the obligation of the landlord is to repair that which is demised and not to give her something much drier in its nature than that which was demised."

In spite of the assurance of Fletcher Moulton J., it is often difficult to establish what is simply repair of old premises and what is making something new—indeed it is, as Lynskey J. said in *Sotheby* v. *Grundy* [1947] 2 All E.R. 761, a question of degree. Hence it is clearly not possible to specify confidently a universal formula which will settle without doubt in a given case whether the

tenant is liable for very extensive repairs or replacements such as are necessitated by extensive dry rot. But it is submitted that certain propositions can be advanced in the light of the cases mentioned: (1) Where the premises are old, damp and badly ventilated, the tenant is not liable for the commencement or spread of dry rot during his tenancy because the premises are inherently of a type in which dry rot is necessarily to be expected; (2) where the premises are not of such a type that dry rot is necessarily to be expected, the tenant must take steps to cut out and replace affected parts, and must ensure that fresh attacks do not occur; unless indeed the rot is so widespread at the commencement of the tenancy that to cut it out and replace it would amount to making a new and different thing, or unless the rot is so trivial and so isolated that it would not discourage a reasonably-minded person from taking a tenancy of the premises in full knowledge of its existence.

How does the tenant's position differ if there is a " fair wear and tear " exception? " Fair wear and tear " means " the ordinary operation of natural forces " (*per* Slesser J. in *Taylor* v. *Webb*, *supra*). " It implicitly refers to both cause and effect and in each aspect it covers two classes of disrepair—(a) that brought about by the normal and ordinary operation of natural causes, such as wind and weather, in contra-distinction to abnormal or extraordinary events in nature, such as lightning, hurricane, flood or earthquake; and (b) that brought about by the tenant, either unintentionally or as a normal incident of a tenant's occupation, in the course of the ' fair ' (or ' reasonable ') use of the premises for any of the purposes for which they were let " (*per* Scott L.J. in *Taylor* v. *Webb*, *supra*). Dry rot is caused quite normally by operation of natural causes—to wit, fungus encouraged by damp and lack of ventilation —and it seems reasonably clear that (in the absence of negligent user) it falls within the first class of disrepair specified by Scott L.J. There is, in fact, a decision in point. In *Terrell* v. *Murray* (1901) 17 T.L.R. 570, there was a covenant in the lease to deliver up the premises in as good repair and condition as at the date of the lease, reasonable wear and tear excepted. At the end of the term there was a claim for dilapidations, including the repair of a kitchen floor affected by dry rot; but it was held that the lessee was not liable for " dilapidations caused by the friction of the air, dilapidations caused by exposure, and dilapidations caused by ordinary use," including the dry rot in the kitchen floor.

It may be asked " what action should be taken in settling a draft lease, to deal adequately with the question of dry rot "? The answer seems to be that there is nothing at all to prevent the parties

from saying expressly that one or other of them shall be responsible for dry rot, and there should be no difficulty in formulating an express reference to dry rot in a repairing covenant. If, however, neither party is anxious expressly to raise the question of this "wasting disease," it is felt that a tenant can protect himself adequately by limiting his liability to keeping and delivering up the premises in as good repair and condition as at the date of the lease, reasonable wear and tear excepted (in this connection it is very desirable that a schedule of condition showing the exact state of the premises at the date of commencement of the lease should be prepared and agreed between the parties, and annexed to or written in the lease); whilst a landlord who wishes a tenant's repairing covenant to cover damage by dry rot should endeavour to secure that the covenant is to keep the premises in good tenantable repair, without any "fair wear and tear" exception—and must bear in mind that even this is insufficient if the replacements required to cope with dry rot amount to "creating a new and different thing."

Liability as Between Vendor and Purchaser

Here again one must commence by saying that the relationship is essentially a contractual one, and it is perfectly possible for the parties to lay down in express terms what shall be the legal position if dry rot is discovered to exist, or to have existed, whether before or after the contract, and whether before or after the conveyance.

Moreover, since the majority of contracts for sale probably incorporate either the Law Society's Conditions of Sale or the National Conditions of Sale, or are formed by correspondence, having the effect of incorporating the so-called "Lord Chancellor's Conditions" laid down under section 46 of the Law of Property Act, 1925, some reference must be made to cases in which one or other of those sets of conditions applies.

The position was considered by Slade J. in the recent case of *Buchanan* v. *Kenner* [1952] C.P.L. 180. In that case the sale was subject to the Law Society's Conditions of Sale (1934 edition), condition 17 (5) of which reads: "A purchaser shall be deemed to purchase with full notice of the actual state and condition of the property, whether as to quantity, state of repair, means of access, enjoyment of light or air or otherwise howsoever, and shall take the same as it stands." The facts of the case were a little complicated, but in essence amounted to this—before the contract was signed, the surveyor employed by prospective mortgagees discovered the presence of dry rot in the front room, a discovery that in his words "made the whole house suspect." The vendor was

made aware that the presence of dry rot throughout the house was suspected by the surveyor, but it was never made clear to the purchaser that there was likely to be dry rot anywhere else in the house; and a builder's certificate was subsequently produced to him by the vendor which would have conveyed to anyone that the builders claimed to have eradicated dry rot in the house as a whole, and not merely in regard to the front room. It was also alleged that the vendor had prior to contract assured the purchaser that the whole place was free from dry rot. Under these circumstances, it was held that there was a collateral warranty that the property was free from rot, the position being that, in consideration of the purchaser entering into the contract to buy the house, the vendor had agreed to eliminate dry rot from the house, which had in fact not been done. Slade J. further held that there was no repugnancy or inconsistency between such a warranty and Condition 17 (5) of the Law Society's Conditions of Sale.

Of course, the circumstances were somewhat unusual in *Buchanan* v. *Kenner*, as the question of dry rot had been raised very actively and the vendor was held to have agreed expressly that he would eliminate it. The case must not be considered as giving rise to a " Purchaser's Charter " in respect of dry rot, because in most cases there will have been no question raised with the vendor as to dry rot; and even if it has been raised and a statement made that there was none, it seems fairly safe to assume that such a statement would be held in most cases to amount only to a misrepresentation inducing the formation of a contract, but giving rise, after the completion of the conveyance, to an action for damages only if fraudulent. (In the case of *Wharton* v. *Pagdin*, heard at Salford county court on September 15, 1952, and referred to in the *Estates Gazette*, September 20, 1952, the vendor had given an assurance before sale that no dry rot existed. It was held that this did not constitute a collateral agreement or warranty, but was a mere innocent misrepresentation not giving rise to a claim for damages.) The circumstances must be quite unusual in which it would be held that the vendor had undertaken to eliminate any dry rot there might be. Perhaps the most interesting point in *Buchanan* v. *Kenner*, which is not explained in the brief report available, is the failure of Condition 17 (5) to cover the situation. On the face of it, the condition appears to be fatal to a complaint by the purchaser as to any defect in the property. But evidently this is an illusion. It is thought that the argument must be on the following lines: (a) The first part of the clause ensures that the purchaser cannot complain that he did not know of a defect; but, if the defect is removable, that does not mean to say that he has necessarily accepted the position. It is

quite open for him to say that it had been stipulated that any such defect should be removed by the vendor; (b) The second part of the clause provides that the purchaser shall " take " the property " as it stands." This apparently means only that the purchaser cannot refuse to complete on the ground of a defect. In other words, the purchaser cannot allege as a condition forming the basis of the contract of purchase that the vendor has agreed to remedy such a defect: but he is not precluded from alleging a warranty to that effect and suing for damages even after completion of the conveyance.

If this is the correct interpretation of *Buchanan* v. *Kenner*, and if that decision stands the test of time, the Law Society may well feel it necessary to consider an amendment to Condition 17 (5) to make it clear that the vendor gives no warranty as to the state of the premises and will not take steps to remedy any defect which may exist. For the moment, the Condition seems only to have the very limited effect mentioned above. The National Conditions of Sale (15th edition) contain (Condition 12 (3)) a very similar provision which must surely be interpreted in the same way. And the Lord Chancellor's Conditions (or more properly The Statutory Forms of Conditions of Sale) contain no reference to the condition of the property. It is submitted generally that, in a case ungoverned by special stipulation, and whether or not subject to one of the common forms of Conditions of Sale which have been mentioned, the purchaser must take the risk of dry rot, unless he can positively show that the vendor promised, as a term of the contract or as a collateral agreement in consideration of his entering into the contract, that he would remedy any dry rot which existed. The rule *Caveat Emptor* is not yet wholly displaced.

As Concerning Professional Adviser and Client

There have been several cases in the past two years in which clients have attacked on the grounds of negligence surveyors who had reported to them on properties subsequently found to be affected by dry rot, and one case in which solicitors were attacked on similar grounds.

In *Grove* v. *Jackman and Masters* (*Estates Gazette*, March 4, 1950) the client was contemplating purchase of a wooden bungalow, and his surveyors reported that it was " soundly constructed on good modern principles of building." In fact, the wooden floors and joists were in an advanced state of dry rot, the damp course was poor, and air ventilators useless. The surveyors alleged that there were no apparent signs of dry rot, but Goddard L.C.J. held

that there were indications of possible dry rot, and the surveyors should have taken up the floorboards to investigate. They were held liable in negligence.

In *Lowy* v. *Woodroffe Buchanan and Coulter* (*Estates Gazette*, November 25, 1950) the purchaser's surveyors took the precaution of saying in their report (which otherwise contained no reference to dry rot): "In view of the prevalence of dry rot in London, it is impossible to guarantee that every property is free." McNair J. nevertheless held them liable in negligence for (inter alia) not discovering the existence of dry rot in wooden framework above the front door, which was described as an "area of suspicion."

On the other hand, in *Tew* v. *H. A. Whitburn & Sons* [1952] C.P.L. 111, a claim was made against surveyors because of their failure to discover wet rot, but Parker J. held that on the facts a reasonable inspection of the property was made, and there was, in his opinion, insufficient evidence of negligence.

The lessons that seem to emerge from these cases are that the surveyor is expected to discover dry rot if there is anything which might give rise to suspicion of its existence; and if he does not pursue the possibility to its end by lifting floorboards and so on (which he may obviously be unable to do) he ought to tell his client of his suspicions and that he has not been able to go further than he has gone. If he does that, he is reasonably safe. And in any case, he is not expected to guarantee that his opinion is correct, provided that he has used reasonable skill and diligence in forming and communicating it.

Solicitors are hardly likely to give, or to be expected to give, expert opinions on the likelihood of dry rot existing in property. But they should be wary of giving their clients the impression that they have satisfactorily cleared up the question unless they have in fact secured an expert opinion which covers the possibility. In *Bain* v. *Bircham* [1952] C.P.L. 30, the vendor's solicitor received a report from surveyors showing that a risk of dry rot might exist, and he told the vendor that the report was "all right." The client sued for negligence, but it was held that there was no case, as the solicitor had given an honest opinion on a matter in which he was not an expert and on which he had made no promise of skilled knowledge. The case does, however, strike a warning note for solicitors who may feel inclined to pass on a too cheerful impression of what may be a somewhat discouraging account of the condition of the property.

In fact, both for surveyors and solicitors, the practice should be "full disclosure" of facts and suspicions. Dry rot is too serious and too insidious a disease to be glossed over or ignored.

PROOF OF INTENT TO DEFEAT OR DELAY CREDITORS

By J. A. Coutts, Barrister-at-Law

(*No.* 360 *of* 1952), *ex p. The Debtor* v. *National Provincial Bank.*

The Court of Appeal has been vouchsafed yet another opportunity to pronounce upon the vexed question of the proper standard of proof of a debtor's intent to defeat or delay his creditors within section 1 (1) (d) of the Bankruptcy Act, 1914. In *Re A Debtor Ltd. and Another* (*a*), the court decided that the standard of proof required is that " the court should be satisfied that in all the circumstances of the case the presence of the intent was so much the most probable explanation of the debtor's conduct as to make it in effect the only one." It is submitted with respect that this statement is equivocal and that, on either interpretation which may be put upon it, it is open to objection.

By section 1 (1) (d) of the Act of 1914, a debtor commits an act of bankruptcy if with intent to defeat or delay his creditors he departs or remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house. " The person who says that another has committed an act of bankruptcy is bound to prove it affirmatively " (*b*). The petitioning creditor has, therefore, the onus of proof not only of the debtor's departure, absence or confinement but also of his intent to defeat or delay his creditors (*c*), although he need not show that any actual delay resulted from the departure (*d*)—and indeed the debtor may be guilty of an act of bankruptcy, even though he can positively prove that his departure was, in the nature of things, incapable of causing such delay (*e*). The departure and the intent are both questions of fact (*f*) and each is separate from the other (*g*). The onus of

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(*a*) [1952] 1 All E.R. 519; [1952] W.N. 92.

(*b*) *Per* Jessel M.R. in *Re Lewis, ex p. Becker* (1893) 9 T.L.R. 406.

(*c*) *Ex p. Mutrie* (1800) 5 Ves.Jun. 575; *Ex p. Bamford* (1809) 2 Ves.Jun. 499.

(*d*) *Robertson* v. *Liddell* (1808) 9 East 487.

(*e*) *Chenoweth* v. *Hay* (1813) 1 M. & S. 676.

(*f*) *Re Stephany, ex p. Meyer* (1871) 7 Ch.App. 188, 190; *Re Wood* (1872) 7 Ch.App. 302, 306.

(*g*) *Re Wood, supra*, n. (*f*). Thus, the intent should be alleged in the petition (*Re Shelton, ex p. Coates* (1877) 5 Ch.D. 979), though its omission may be remedied by an amendment before adjudication (*Re Fiddian, Squire & Co.* (1892) 10 Morr. 95).

proof of each of these facts is the same as in any other case (*h*), so that each may be established either by direct evidence or by inference. To establish a departure within the subsection, it must be shown that the debtor is alive and in some other place, and, although in an ordinary case his absence is "pretty good proof" of his having gone away, it is not conclusive (*i*). To establish the intent required by the Act, the petitioning creditor must prove that the debtor's intent was absolute and not conditional on an event (*k*), and, although he need not establish it as the sole intent (*l*), he must prove that it was at least the debtor's principal object that his creditors should be defeated or delayed. This intent may be established either by direct evidence (*i.e.*, by the debtor's own admissions) or by inference; and although it has been stated that "in ninety-nine cases out of a hundred, this can only be got at by the declarations of the party himself" (*m*), it would appear that in practice, on the contrary, "as no direct evidence is generally obtainable, it is a matter of inference from the circumstances" (*n*). It is upon the question of the principles which are to govern the making of this inference that difficulties have arisen.

Before 1934, there was a considerable body of authority in favour of the proposition that where a petitioning creditor proved that the debtor had left the country and that a necessary consequence of his departure was that his creditors would be defeated or delayed, the onus of proof (that such was not his intent) was then placed on the debtor, by reason of the operation of the maxim that a man is presumed to intend the necessary consequences of his act. This is explicitly stated to be the law by Lawrence J. (*o*) in 1798, by Lord Ellenborough C.J. (*p*) in 1808 and by Gibbs C.J. (*q*) in 1814; and these opinions are frequently echoed later in the century (*r*). Conversely, the maxim could operate to prevent an inference of intent to delay, where the natural consequence of the debtor's act was to accelerate his creditors (*s*). It is not

(*h*) *Per* Jenkins L.J. in *Re A Debtor* (*No.* 360 *of* 1952), *supra*; *cf. Re Stephany, ex p. Meyer*, *supra*, n. (*f*) (at p. 190).
(*i*) *Re Stranger, ex p. Geisel* (1882) 22 Ch.D. 436; *cf. Re Lewis, ex p. Becker* (1893) 9 T.L.R. 406.
(*k*) *Fisher* v. *Boucher* (1830) 10 B. & C. 705, 710.
(*l*) *Ramsbottom* v. *Lewis* (1808) 1 Camp. 279; *Warner* v. *Barber* (1816) Holt N.P. 175.
(*m*) *Per* Best C.J. in *Rawson* v. *Haigh* (1824) 2 Bing. 99, at p. 103.
(*n*) *Per* Jenkins L.J. in *Re A Debtor* (*No.* 360 *of* 1952), *supra*.
(*o*) In *Fowler* v. *Padget* (1798) 7 T.R. 509.
(*p*) In *Ramsbottom* v. *Lewis* (1808) 1 Camp. 279.
(*q*) In *Holroyd* v. *Whitehead* (1814) 3 Camp. 530.
(*r*) See *Re Bryant, ex p. Kilner* (1837) 3 Mont. & A. 722; *Re Kirkham, ex p. Kirkham* (1833) 3 Deac.Ch. 450; *Re M'Keand, ex p. M'Keand*, 5 T.L.R. 564; *Re Finnley, ex p. Goater* (1874) 30 L.T. 620.
(*s*) *Re Stephany, ex p. Meyer* (1871) 7 Ch.D. 188, 191.

surprising, therefore, that the law is stated in the Hailsham edition of *Halsbury's Laws of England* (1931) (*t*) in the terms that if the necessary consequence of the debtor's departure is to delay his creditors, a presumption of intent to delay is raised against him, which he must rebut by some other explanation (*u*). On the other hand, it was several times remarked that "the going abroad was of itself an equivocal act" (*x*), that departing the realm, absenting himself or keeping house "were all in themselves innocent actions" (*y*), so that "the fact of the debtor having departed from his dwelling-house in itself announces nothing," for "he may have gone to bury his wife or his mother, or to a meet of fox-hounds" (*z*). But it will be noticed that these dicta do not in any way limit the application of the maxim, for it is common ground that the maxim can have no application until the petitioning creditor establishes not only the debtor's departure, but also the fact that the delaying of his creditors is a necessary consequence of that departure. Similarly, in those cases—particularly those of foreigners returning to their homes abroad (*a*)—in which the maxim is discussed and not applied, it may be observed that, whenever the court did not infer an intent to defeat or delay creditors, it was because another explanation rebutting the presumption was accepted (*b*). For example, inability to pay one's way is "a most justifiable cause for leaving England" in the case of a foreigner, though it would not *ipso facto* explain an Englishman's departure (*c*). The maxim was first questioned in cases relating to the debtor's intent in the making of a fraudulent preference, and, since such cases are governed by the same principles as apply to

(*t*) Vol. II, p. 28. *Williams* v. *Nunn* (1808) 1 Taunt. 270, there cited as an additional authority for this proposition, is not an authority on inference, since Mansfield C.J. there relied on the direct evidence that "by his own confession it was to avoid arrest" that the debtor departed. Nor does *Rawson* v. *Haigh* (1824) 2 Bing. 99 appear to support the statement that "evidence of intent need not be very strong," for which proposition it is there alone cited.

(*u*) *Cf. Austen, ex p. Austen* (1837) 2 Deac. 533; *Vincent* v. *Prater* (1812) 4 Taunt. 603.

(*x*) *Rawson* v. *Haigh* (1824) 2 Bing. 99, 103; *cf. Rouch* v. *G. W. Ry.* (1841) 1 Q.B. 51, 63.

(*y*) *Per* Mellish L.J. in *Re Wood* (1872) 7 Ch.App. 302, 306.

(*z*) *Per* Bacon C.J. in *Re Skelton, ex p. Coates* (1877) 5 Ch.D. 979, 980.

(*a*) *Re Crispin, ex p. Crispin* (1873) 8 Ch.App. 374; *Re Gutierrez, ex p. Gutierrez* (1879) 11 Ch.D. 298; *Re Cohen, ex p. Bankrupt* v. *Inland Revenue Commissioners* [1950] 2 All E.R. 36, 39.

(*b*) As in *Re Trench, ex p. Brandon* (1884) 25 Ch.D. 500, 504 and *Re Langworthy, ex p. Langworthy* (1887) 3 T.L.R. 544, 545.

(*c*) The decisions in *Re Parr, ex p. Osborne* (1813) 2 Ves. & B. 177 and *Re Radcliffe* [1916] 2 Ir.R. 534, are based on nothing more than the fact that the debtor's departure and the creditor's being delayed do not in themselves establish the fact that the one is the necessary consequence of the other.

those of intent to defeat or delay creditors (*d*), reference may be made to them in interpreting section 1 (1) (d) of the Act.

Since "persons must be just before they are generous and debts must be paid before gifts can be made" (*e*), a trustee in bankruptcy may impugn as a fraudulent preference within section 44 of the Act, "every conveyance or transfer of property . . . in favour of any creditor, with a view to giving such creditor, or any surety or guarantor . . . a preference over the other creditors." The onus of proof is on the trustee in bankruptcy (*f*) to establish the transfer and the intent, which are both facts (*g*). The principles governing the proof of these facts being the same as in any other case (*h*), the debtor's intent may be established either by direct evidence (*i.e.*, by his admissions (*i*)) or by inference, but since, in these cases, admissions are "not much to be relied on" (*k*), the intent must generally be a matter of inference. The question of the principles upon which such inference is to be made has (as in cases arising out of section 1 (1) (d)) caused much difficulty. Before 1934, there was authority for the statement of the law in terms that if the trustee in bankruptcy proved not only that the debtor had made a transfer of property to a creditor but also that the necessary consequence of that transfer was to give that creditor a preference over other creditors, then the onus of proof (of some other intention on the part of the debtor (*l*)) shifted to the creditor, who wished to retain the property transferred. In the absence of any other explanation established by the creditor to rebut the presumption, the intention required by the Act was inferred against him. This rule is stated by Cockburn C.J. in *Bills* v.

(*d*) *Per* Jenkins L.J. in *Re A Debtor* (*No.* 360 *of* 1952), *supra*.

(*e*) *Per* Lord Hatherley L.C. in *Freeman* v. *Pope* (1870) L.R. 5 Ch. 538, 540.

(*f*) *Thurburn* v. *Steward* (1871) L.R. 3 P.C. 478, 518; *Re Marsden, ex p. Lancaster* (1883) 25 Ch.D. 311, 319. The statement by Vaughan Williams J. in *Re Eaton & Co.* [1897] 2 Q.B. 16, 17, that a payment by a debtor who knows he is insolvent "causes the onus of proof to shift" was dissented from in *Bulteel, Colmore* v. *Parker* and *Bulteel's Trustee in Bankruptcy* (1916) 32 T.L.R. 661 and by Pollock M.R. in *Re Cohen, ex p. Trustee* [1924] 2 Ch. 515.

(*g*) *Cook* v. *Rogers* (1831) 7 Bing. 438, 446; *Fidgeon* v. *Sharpe* (1814) 5 Taunt. 539; *Bell* v. *Simpson* (1857) 2 H. & N. 410; *Thurburn* v. *Steward* (1871) L.R.S.P.C. 478, 517. But later statements emphasise that this question of fact can be answered only by a tribunal "first duly instructed as to the law": *Re Cohen, ex p. Trustee* [1924] 2 Ch. 515, 536; *cf. Freeman* v. *Pope* (1870) L.R. 5 Ch. 538, 540, 545; *Re Ramsay, ex p. Deacon* [1913] 2 K.B. 80, 84. It would appear to be the opinion of Lord Cairns in *Thurburn* v. *Steward, supra*, that where it is a matter of inference it is a question of law. But "even as a question of mixed fact and law" it was a question properly left to a jury: *per* Dallas J. in *Fidgeon* v. *Sharpe, supra*.

(*h*) *Re M. Kushler, Ltd.* [1943] Ch. 248, 252, 254.

(*i*) *Harman* v. *Fisher* (1774) 1 Cowp. 117; *cf. Re Doyle, ex p. Hague* (1810) 1 Rose 150; *Rouch* v. *G. W. Ry.* (1841) 1 Q.B. 51.

(*k*) *Re Craven & Marshall, ex p. Tempest* (1870) 6 Ch.App. 70.

(*l*) Conversely, other acts of preference could be used, to establish the intent to prefer which was in issue: *Re Ramsay, ex p. Deacon* [1913] 2 K.B. 80, 87.

Smith (*m*) and by Lord Hatherly L.C. and Giffard L.J. in *Freeman* v. *Pope* (*n*) and it is accepted by Sargant L.J. in *Re Cohen, ex p. Trustee* (*o*). Indeed, the two earlier decisions appear to go so far as to say that a payment made by an insolvent will automatically give rise to a presumption of intent to prefer the payee, should the insolvent become bankrupt. There are, however, innumerable statements to the effect that the mere payment by an insolvent is equivocal. Lord Mansfield (*p*) thought, in 1774, that "if a preference were only consequential the case might be different"; and, a century later, Lord Cairns (*q*) regards it as "well settled by the authorities" that the mere insolvency of the person making the payment is insufficient (*r*). It is to be noted, however, that these cases merely decide that proof of payment, insolvency and preference gives rise to no inference as to intent, for it is not a necessary consequence of a payment by an insolvent that the payee will be preferred, since, if nothing else were proved, it would be equally open to assume, at the moment of payment, that the debtor might recover. And where the preference is not proved to be the necessary consequence of the payment, there can obviously be no question of applying the maxim that a man is presumed to intend the necessary consequences of his act. These early decisions have, therefore, no bearing upon the proper applicability of the maxim.

The first occasion upon which proof of the real or actual intention of the debtor was required on the ground that the court could not presume the required intention from the necessary consequences of his acts was in 1897, when Lord Esher M.R. held (*s*) that: "It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." This statement was adopted by Lord Halsbury on appeal (*t*) and was followed by Pollock M.R. in *Re Cohen, ex p. Trustee* (*u*) and by Lord Tomlin in *Peat* v. *Gresham's Trust, Ltd.* (*x*). No reason has been advanced to explain why the maxim

(*m*) (1865) 6 B. & S. 314, at pp. 319, 321, 324.
(*n*) (1870) L.R. 5 Ch. 538 at pp. 540, 541, 543 and at p. 545.
(*o*) [1924] 2 Ch. 515. Lord Warrington in *Peat* v. *Gresham Trust, Ltd.* [1934] A.C. 252 explained that this was not the conclusion reached by him (or by Pollock M.R.) in that case.
(*p*) In *Harman* v. *Fisher* (1774) 1 Cowp. 117.
(*q*) In *Thurburn* v. *Steward* (1871) L.R. 3 C.P. 478, 518.
(*r*) In *Fidgeon* v. *Sharpe* (1814) 5 Taunt. 539; *Re Cheeseborough, ex p. Blackburn* (1871) L.R. 12 Eq. 358; In *Re Walker, ex p. Topham* (1873) 8 Ch.App. 614; *cf. Bell* v. *Simpson* (1857) 4 H. & N. 410 and *Butcher* v. *Stead* (1875) L.R. 7 H.L. 839, 846.
(*s*) In *New, Prance & Garrard's Trustee* v. *Hunting* [1897] 1 Q.B. 607, 617.
(*t*) *Sub nom. Sharp* v. *Jackson* [1899] A.C. 419.
(*u*) [1924] 2 Ch. 515; *cf. Re Hoyle, ex p. Trustee* [1924] B. & C.R. 22.
(*x*) [1934] A.C. 252, 262.

is not "true for this purpose," and it is submitted that there is no reason for rejecting it, as such; for if, to proof of payment and insolvency there be added proof of the impossibility of the debtor's recovery, then, since the preferring of the payee is a necessary consequence of the payment, there would appear to be no reason to refrain from presuming that he intended this consequence. And this is true *a fortiori* where the debtor was aware that he could not recover. It is submitted that the true reason for the requirement of proof of the "actual" or "real" intention of the debtor lies, not in the rejection of the maxim, but, rather, in the fact that the application of the maxim does not result in an inference of that intent which the Act requires. For the Act requires that the preferring of the creditor shall have been not merely an intent, but the dominant intent, of the debtor. Indeed, as late as 1873, the Court of Appeal (*y*) described as "a perfectly accurate description of the state of the law" a statement of the Chief Judge in Bankruptcy (*z*) to the effect that the intent required must be the sole intent. In 1883, however, this was declared to be "too strong to be generally applicable" and all three members of the Court of Appeal (*a*) expressly stated (albeit *obiter*) that the required intent need be no more than the substantial, operative effectual intent. Since these cases are likely to be "compounded of a variety of circumstances" (*b*) in which the debtor has mixed motives, the conclusion that the statutory intent need not be the sole intent is obviously important, but, for present purposes, the more important aspect of this conclusion is that the Act requires proof of something more than *an* intent. It is, therefore, submitted that:—(1) if the necessary consequence of the payment by the debtor is the preferring of the creditor, the debtor should be presumed to have intended this; but (2) since the preference is only *a* necessary consequence (and not necessarily the only, or even the most important, consequence) of the payment, it gives rise to a presumption of no more than *an* intention. It is for this reason that the maxim that a man must be presumed to intend the consequences of his act cannot in itself establish the intent, which is a condition precedent to a fraudulent preference within section 44 or an act of bankruptcy within section 1 (1) (d). It follows that Lord Tomlin's conclusion (*c*), that "where there is room for more than one explanation . . . it is

(*y*) In *Re Walker, ex p. Topham* (1878) 8 Ch. at p. 614.
(*z*) *Re Cheeseborough, ex p. Blackburn* (1871) L.R. 12 Eq. 358.
(*a*) In *Re Bird, ex p. Hill* (1883) 23 Ch.D. 695, 701, 703, 704–5; *cf. Re Wilcoxon, ex p. Griffith* (1883) 23 Ch.D.
(*b*) The phrase is that of Park J. in *Cook* v. *Rogers* (1831) 7 Bing. 438; *cf. per* Evershed M.R. in *Re Cohen, ex p. Bankrupt* v. *I.C.R.* [1950] 2 All E.R. 36, 39.
(*c*) In *Peat* v. *Gresham's Trust, Ltd.* [1934] A.C. 252, 262.

not enough to say . . . the intent to prefer must be inferred," must be interpreted to mean that the intent *is* to be inferred, but not necessarily as the dominant intent. And it is on this question of the relative importance of the intent that, without further evidence, " it is improper to speculate " (*d*).

The decision in *Peat* v. *Gresham's Trust, Ltd.* (*c*) to the effect that if another explanation is possible the intent to prefer need not be inferred was mis-stated in the headnote to read " there being no direct evidence of such an intention, an intent to prefer could not be inferred." This is repeated in the headnote to *Re Lyons, ex p. Barclays Bank Ltd.* (*e*) and (*pace* Lord Greene M.R. (*f*)) appears to be the view there taken by Romer L.J. who held that " there are other explanations, and that being so, we are not authorised, as the law stands, to infer such an intention." It was also accepted by Bennett J. in *Re M. Kushler, Ltd* (*g*), but the Court of Appeal, reversing his decision in that case, held that, since the inference of intent is to be drawn on principles commonly employed by the court (*h*), it follows that, although the possibility of an alternative reason may prevent the court from inferring the statutory intent, it does not necessarily do so. The court will presume the debtor to have intended all the consequences which are established to its satisfaction as necessary consequences. It will not speculate as to consequences (or reasons) that may exist, even though " it is hard to imagine circumstantial evidence of facts in regard to which there might not be a possible alternative " (*i*). But when once the court is satisfied that the debtor had various reasons for his act, it is its duty to weigh those reasons. The opinion of Jessel M.R. that we " should not entangle ourselves in an enquiry as to the precise views and intentions of the parties in order to see what was the motive of the transaction " (*k*) appears to deny what is precisely the court's task. And neither Bowen L.J.'s deprecation (in that case) of " the old metaphysical explanation of the motives of people " which " lead to a discussion as to what is the motive of a

(*d*) It is submitted that both Lord Tomlin's statement and that of Pollock M.R. in *Re Cohen, ex p. Trustee* [1924] 2 Ch. 515, 535 to the effect that " without evidence, the matter must be left where it is, unexplained " are accurate only if " the matter " be, not the existence of an intent to prefer, but the question whether that intent is the operative, effectual intent.

(*e*) (1934) 152 L.T. 201.

(*f*) In *Re Kushler, Ltd.* [1943] Ch. 248, Lord Greene M.R. concludes that Romer L.J. did not intend to preclude the court from drawing an inference where some other possible explanation was open, but it is submitted that such precluding of the court is precisely what Romer L.J. intended in the passage cited above.

(*g*) [1943] Ch. 248.

(*h*) Which principles, it may be remarked, include the presumption that a man intends the necessary consequences of his act.

(*i*) *Per* Lord Greene M.R. in *Re M. Kushler, Ltd.* [1943] Ch., at p. 253.

(*k*) In *Re Wilcoxon, ex p. Griffith* (1883) 25 Ch.D. 69, 73.

motive (*l*), whatever that may mean " nor his metaphors (*m*) about the difficulty of dark and unknown voyages on the misty sea of the shadows of a man's mind, can prevent the conclusion that the court's task is to find the " master motive " (*n*) of the debtor's act. It was in the course of such examination of the debtor's intentions in *Re A Debtor* (*No.* 360 *of* 1952) (*o*) that the Court of Appeal enunciated two propositions relating to the principles upon which the statutory intent may be inferred. First, there is no need to demonstrate that the debtor's intent to defeat or delay his creditors is the only possible explanation of his conduct; and secondly, the court should be satisfied that the presence of the intent is so much the most probable explanation as to make it the only probable explanation in effect.

The statement that the statutory intent need not be demonstrated to be the only possible explanation of the debtor's conduct has two separate meanings in the two separate situations to which it may be applied, for the possible explanations of the debtor's conduct (other than that he acted with the statutory intent alone) are (i) that he acted with some non-statutory intent alone, and (ii) that he had both types of intent simultaneously. In the first place, therefore, it may be the case that there is the possibility that he acted with statutory intent and there is the possibility that he acted with non-statutory intent, although in the circumstances these possibilities are shown to be mutually exclusive (*p*). Here, the statement that the statutory intent need not be demonstrated to be the only possible intent means no more than that a non-statutory intent remains a theoretical possibility, even though it be ignored in practice when once the statutory intent is found to be the more probable; for, in such a case, the court's task is to find which is the more probable of these mutually exclusive possibilities. If the court hold that the reasons are equally competing, then, of course, the onus on the person impugning the transaction is not discharged (*q*); but, if the statutory intent be held to be the more probable, the non-statutory intent is *ex hypothesi* excluded in effect, for the standard of proof is that of an ordinary balance of probabilities (*r*). It is submitted with respect that Jenkins L.J.'s

(*l*) " The question is, What is the motive of that motive? " : *per* James L.J. in *Re Craven & Marshall, ex p. Tempest* (1870) 6 Ch.App. 70.

(*m*) In *Re Bird, ex p. Hill* (1883) 25 Ch.D. 695, 705.

(*n*) *Re Deacon, ex p. Ramsay* [1913] 2 K.B. 80, 85.

(*o*) [1952] 1 All E.R. 519.

(*p*) For example, a debtor may have paid a creditor, possibly to prefer him as a friend, possibly because pressed by him as an enemy.

(*q*) See *per* Goddard L.J. in *Re M. Kushler, Ltd.* [1943] Ch. 248, at p. 255.

(*r*) In *Re Marsden, ex p. Lancaster* (1883) 25 Ch.D. 311, Cotton L.J. describes the required intent as "a matter which it is for the appellant to make out—not, of course, conclusively but so as to satisfy us " (at p. 319).

reference to his sensibility of " the caution as to the degree of proof which a court should require, administered by the Court of Appeal in *Re M. Kushler, Ltd*" (*s*), is unfortunate if it be intended to indicate a standard of proof higher than a mere balance of probabilities. The caution there administered by Lord Greene M.R. was to the effect that " the court is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty unless there are solid grounds for drawing them." The profession still awaits the judge bold enough to say, " This case involves no dishonesty and I shall therefore draw inferences on specious grounds" (*t*); yet such a confession would merely express what is implied in the " caution," which is, it is submitted with respect, at best otiose and, if it points to a standard higher than that normally obtaining in civil proceedings, misleading. The statement is the more unfortunate, it is submitted with respect, in view of Goddard L.J.'s reference in the same case to giving a creditor the benefit of the doubt on the ground that this " only means that the case against him is not proved beyond reasonable doubt "—a phrase traditionally associated with a standard of proof higher than a balance of probabilities.

The second type of situation in which it may be stated that there are other possible explanations of the debtor's conduct is that in which it is possible that he acted with the statutory intent and at the same time with some non-statutory intent. Indeed, such situations—those of mixed motives—would appear to be the more common in practice. Where there are such mutually competing, but not mutually exclusive, possibilities, the task of the court is to decide whether the statutory intent is so much the most effective as to be the only effectual motive which the court need regard. But this is not to say that it must be so much the most probable motive as to make it in effect the only probable one. The court must merely be satisfied on a balance of probabilities that the non-statutory motives were so trivial (*u*) that the statutory motive was the effectual operative motive. To say that the statutory intent may be established notwithstanding the possibility of some non-statutory intent means, therefore, two distinct things. In the first type of situation, that of mutually exclusive possibilities, a non-statutory intent may remain a possibility, but can no longer be regarded as an

(*s*) [1948] Ch. 248, *per* Lord Greene M.R., at p. 252.

(*t*) " Solid, sound or reliable or real (opp. specious) " : *Pocket Oxford Dictionary*.

(*u*) *Re Wilcoxon, ex p. Griffith* (1883) 23 Ch.D. 69, 73. Conversely, the statutory intent was ignored by Lord MacNaghten in *Sharp* v. *Jackson* [1899] A.C. 419, 427, on the ground that it was " only with a very secondary view that the debtor regarded the creditors."

operative probability, if the court is to find an act of bankruptcy. In the second type of situation, that of competing, but not mutually exclusive, possibilities, a non-statutory intent may be a probability (and even a moral certainty) and yet not prevent the court from finding an act of bankruptcy, which it may do on the ground that the non-statutory intent, though certainly existing, is too trivial to be regarded. The standard of proof is, however, the same in each of the two cases: the court must be satisfied on balance that it is more probable than not that the statutory intent was in the first case the sole, and in the second case, the effectual intent.

"The proper standard of proof" is indicated by Jenkins L.J. in *Re A Debtor* (*No.* 360 *of* 1952) (*x*) in the terms that "the court must be satisfied that . . . the presence of the intent was so much the most probable explanation . . . as to make it in effect the only probable one." This proposition appears to be open to two constructions. In the first place it may mean that when once a single explanation has been accepted as more probable than the others, those others, though still possible explanations, can no longer be regarded as probable, so that the explanation which is more probable than the others becomes the only explanation to be accepted in effect. This—it is submitted, the natural—interpretation of the court's judgment would leave the standard of proof as one of a balance of probabilities, but it is open to two objections. In the first place, it is not usual to restrict the meaning of the word "probable" in this way; indeed, the description of an explanation as most probable is itself proof of an acceptance of lesser probabilities. To this, it may be answered that the greatest is the only effective probability. But secondly, if this interpretation expresses the rule which the court intended to enunciate, it is submitted with respect that it would be more accurately expressed in the terms, "the court must be satisfied that the presence of the intent was the most probable, *that is*, in effect, the only probable explanation." If, on the other hand, the court, upon deciding which is the most probable of several competing probable explanations, is still prepared to regard the other explanations as properly describable as probabilities, the most probable explanation is not *ipso facto* the only explanation. If such be the view of the court, the only meaning to be attributed to the phrase "so much the most probable explanation as to be the only one" is that it indicates a standard of proof higher than that of a balance of probabilities. Although Jenkins L.J.'s reference to the "caution" administered

(*x*) [1952] 1 All E.R. 519.

in *Re M. Kushler, Ltd.* (*y*) may be thought to lend some support to this interpretation of his judgment, it is submitted that the court's intention was probably to state no more than that where several probabilities exist the court must choose the most likely and can then ignore the others—the test being, " in other words, was this in effect the only probable, though not necessarily the only possible, explanation of his conduct? "

(*y*) [1943] Ch. 248.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Trustee—" out of the United Kingdom for more than 12 months " —Trustee Act, 1925, s. 36 (1), (8).—Re Stoneham Settlement Trusts [1952] 2 T.L.R. 614 was a case on an interesting short point of some importance. Danckwerts J. decided first and without hesitation, that it was the plain meaning of section 36 (1) of the Trustee Act, 1925, that a trustee who remained out of the United Kingdom for more than 12 months could be removed from the trust under the statutory power whether he agreed or not. His Lordship could not see any room for the doubts expressed on this point in Lewin, 15th ed., at p. 422, and in Underhill, 10th ed., at pp. 449 and 450.

The second question, which was the real purpose of the summons, was whether a trustee who has been removed for this reason is a " refusing or retiring trustee " within section 36 (8) of the Act. By that subsection " a continuing trustee " includes " a refusing or retiring trustee," and the concurrence of the latter, if he is willing to act, must be obtained in the appointment of new trustees. The learned judge felt that in the absence of any binding authority, a person who is compulsorily removed from a trust is not a " refusing or retiring trustee," in the case at any rate of one who has been removed because of his absence outside the United Kingdom for more than 12 months. He decided that *Re Coates to Parsons* (1886) 34 Ch.D. 370 did not bind him, as there North J. decided that the case on its facts did not come within the identically worded subsection of the Conveyancing Act of 1881. There, the trustee who had been removed was not ready and willing to act.

Danckwerts J. held, therefore, that the appointments in question, which had been made by a single trustee who was retiring in the normal way, and without the concurrence of a trustee who had been removed because of his absence abroad, were perfectly valid and effective.

Mortgagor's common law power of leasing—mortgagee's right to possession—estoppel by conduct.—Bradford Permanent Building Society v. *Cholmondeley* [1952] 9 C.L. 121 (see note, *ante*, p. 387) was followed by Danckwerts J. in *Parker* v. *Braithwaite* [1952] 2 T.L.R. 731. A mortgagor, whose statutory power of leasing was excluded unless with written consent of the mortgagees, leased to a tenant without such consent. When the mortgagees sought possession, which was some six months after they came to hear of the tenancy, the

tenant opposed the claim on the ground that the mortgagees had recognised her tenancy.

As in the *Bradford Case* (*supra*) the agent of the mortgagees, who were a building society, was acting in more than one capacity, and in the present case was also acting as agent for the mortgagor by collecting rent from the tenant. Though the agent had informed the mortgagees of the existence of the tenancy, the learned judge found that as regards the tenant, the agent had acted solely as agent for the mortgagor. It would have been different had the agent gone to the tenant as agent for the mortgagee and requested the tenant to pay rent to him in that capacity: *Doe* d. *Whitaker* v. *Hales* (1831) 7 Bing. 322.

The learned judge found therefore on the facts, which he thought were stronger than those in the *Bradford Case* (*supra*), that the mortgagees had in no way recognised the tenancy, though he did not deny "that there may be cases where a mortgagee may so conduct himself as to confirm in some way a tenancy which has been created by the borrower. . . ." The mortgagees' claim for possession was therefore successful.

"Land"—inclusion of dwelling-house and buildings—Agriculture Act, 1947, *ss.* 17, 109 (2).—The Queen's Bench Division decided in *Hasell* v. *McAulay* [1952] 2 All E.R. 825, an appeal by way of case stated, that where the Minister of Agriculture and Fisheries had made an order under section 17 (1) (b) of the Agriculture Act, 1947, requiring the owner of an "agricultural unit" to give up occupation of the "land," such order applied also to the occupation of a dwelling-house and other buildings on the land. Goddard L.C.J. decided that clearly by section 109 (2) of the Act "agricultural unit" means "land which is occupied as a unit for agricultural purposes, including (a) any dwelling-house or other building occupied by the same person for the purpose of farming the land. . . ."

The appeal by the owner-occupier was therefore dismissed.

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2. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Enforcement notice—non-compliance—invalidity of notice.—Mead v. *Plumtree* [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723 carries one stage further the elucidation of the proper course for an occupier of land to take when faced with an enforcement notice (under section 23 of the Town and Country Planning Act, 1947) which he believes to be invalid. It was decided in *Perrins* v. *Perrins* (1951) 1 P. & C.R. 457, noted 15 Conveyancer 188, that if the objection to the notice is one which under the express provisions of section 23 (4) would compel a court of summary jurisdiction to allow an appeal

against the notice, then the only thing to do is to appeal; if such an objection is not taken by way of appeal, it can never be taken at all. It is clear, however, that an enforcement notice can be a nullity for reasons unconnected with the matters listed in section 23 (4); an example being the sort of formal defect that invalidated the notice with which *Burgess* v. *Jarvis* (1952) 2 P. & C.R. 877, noted 16 Conveyancer 137, was concerned. In the present case, an enforcement notice of *Burgess* v. *Jarvis* type was ignored by the person upon whom it was served. Since such a notice can never take effect, this would seem to have been a reasonable thing to do. However, the local planning authority prosecuted for non-compliance with the notice and secured a conviction, and an appeal to quarter sessions was dismissed. It was dismissed (as, incidentally, were various appeals in similar cases) in the face of *Burgess* v. *Jarvis* and in reliance on the words of *Perrins* v. *Perrins*: such as "if a planning authority choose to serve an enforcement notice, and that notice is not challenged within 28 days, it becomes effective, and there is the end of the matter." The words of *Perrins* v. *Perrins*, however, go too far; and when the present case reached the Divisional Court the principle for which *Perrins* v. *Perrins* is authority was explained as that set out earlier in this note. It is now clear that except in cases where the objection to the notice falls within the grounds of appeal expressly given by section 23 (4), that objection can be raised as a defence to any subsequent proceedings based upon the notice. If such an objection is a sound one, it is legitimate to ignore the notice.

This, however, is not the end of the matter. An occupier of land who is uncertain whether an enforcement notice that is served upon him is good or not may not wish to wait until he is prosecuted for non-compliance and then see whether he has a defence. So the further question arises: must he wait, or can he appeal against the notice if he prefers? The comments of the Divisional Court in the present case suggest that there can be no appeal, except where *Perrins* v. *Perrins* applies. If so, either he cannot wait for prosecution or he must wait; he can never have a choice. The point was not in issue, however, and the present case does not decide it; the court's comments may go too far, as they did in *Perrins* v. *Perrins*. On the other hand, the Divisional Court that decided *D'Alessio* v. *Enfield U. D. C.* (1951) 2 P. & C.R. 166, noted 15 Conveyancer 441, did send back to magistrates to be quashed an enforcement notice that had been objected to upon a purely formal ground not mentioned in section 23 (4). As a precedent, however, that case has two defects. First, the point was not argued; and secondly, by reason of certain provisions of section 75 of the Act (provisions, however, to which the attention of the court was apparently not directed) there probably was an express power to quash that particular order. So the point remains open, although it is too important to remain open for very long. Meanwhile, in a case important enough to justify the expense, the bringing of a High Court action in which the validity of the notice is in issue is always worthy of consideration.

It may be worth considering the implications of the fact that it was necessary to go to the Divisional Court to dispose of the prosecution in the present case. Once given the decision of the Court of

Appeal in *Burgess* v. *Jarvis*, the present case ought to have been a clear one. Compared with most of the points of law raised by the Town and Country Planning Act, 1947—or its predecessors, for that matter—the present case was undoubtedly simple. The judgments in *Perrins* v. *Perrins* could not by themselves have misled any experienced chairman of quarter sessions: it is obvious that the court was not purporting to make precise statements of principle that could be applied literally to other sets of facts. In fact, more than one quarter sessions went wrong in this sort of case. It seems clear that the obscurity and complexity of the Town and Country Planning Act, although they may be tolerable in matters falling to be considered by the Ministry itself, or by High Court judges, are utterly unsuitable for provisions that have to be considered by courts of summary jurisdiction.

Compulsory purchase—local authorities' land.—Middlesex C. C. v. *Minister of Local Government and Planning*, noted 15 Conveyancer 361, has now been before the Court of Appeal: [1952] 2 T.L.R. 651; [1952] 2 All E.R. 709. The special protection against compulsory purchase by one public authority of land that is the property of another public authority only applies (so say the Court of Appeal, reversing the decision below) when the latter authority duly objects to the purchase in its capacity as owner. It follows (and here is the point of the present case) that the special protection cannot be available to an authority that only buys the land after the time for objection to the compulsory purchase has expired: for otherwise, any objection that authority makes either is made before it owns the land (and so not as owner) or is made out of time (and so is not duly made). This seems not only reasonable but also, in so far as it lessens the scope allowed to local authorities for legal squabbling, in the interests of ratepayers too.

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3. *LANDLORD AND TENANT CASES*

By J. MUIR WATT, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—mixed premises—shop with living quarters above—premium.—The case of *Whiteley* v. *Wilson* [1952] 2 T.L.R. 802 is interesting for the manner in which it deals with the two principles, at first sight difficult to reconcile, exemplified in *Vickery* v. *Martin* [1944] K.B. 679, and *Pender* v. *Reid*, 1948 S.C. 381, and for its disapproval of the reasoning of Hallett J. in *Thompstone* v. *Simpson* [1952] 1 T.L.R. 447. In *Whiteley* v. *Wilson* the premises consisted of a shop on the ground floor with dwelling accommodation above. There was inter-communication between the shop and the dwelling but also separate access to each. It was held that the premises were a dwelling-house within the Rent Restrictions Acts, and

that, consequently, a premium paid on the assignment of the tenancy was illegal and recoverable. It was sought to argue, on the basis of *Pender* v. *Reid* and *Feyereisel* v. *Turnidge* [1952] 2 Q.B. 29, that the court had to consider whether the residential or the business user was predominant. The court held that the *Pender* v. *Reid* principle had no application to a single entity, consisting of mixed residential and business premises. In such cases the rule in *Vickery* v. *Martin* applied. The considerations which were discussed in *Pender* v. *Reid* and in *Feyereisel* v. *Turnidge* only arise where there is more than one entity. The court criticised the reasoning of Hallett J. in *Thompstone* v. *Simpson* in so far as he regarded *Pender* v. *Reid* as applicable to the parts of a single structure. The distinction is succinctly stated by Megarry (The Rent Acts, 6th ed., p. 64)—" if the business part is more important than the dwelling, the Acts apply where there is but one entity, yet are excluded where there are two entities."

(Rent Restrictions Guide, 3rd ed., p. 25.)

Rent Restrictions Acts—part of premises sub-let by contractual tenant—not self-contained flats—expiry of contractual tenancy—statutory tenant's position.—In *Crowhurst* v. *Maidment* [1952] 2 All E.R. 808 a contractual tenant of a house let two floors, retaining in his own occupation the ground floor. The two floors let were not self-contained flats in the physical sense. The contractual tenant had no intention of occupying the two floors in question. On the expiration of the contractual tenancy the landlord claimed possession of these two floors. It was held, applying the general principle of *Skinner* v. *Geary* [1931] 2 K.B. 546 (and somewhat extending its application in *Murgatroyd* v. *Tresarden* [1946] 2 All E.R. 723) that as a statutory tenant's protection is limited to the occupation of the house in which he actually resides, the landlord was entitled to the possession of the two floors. The principle of *Skinner* v. *Geary* has cut into the principle expressed in section 15 (1) of the 1920 Act, that the statutory tenancy continues the terms of the contractual tenancy so far as these are consistent with the Acts. In *Murgatroyd* v. *Tresarden* the flats were " self-contained," but here they were not. The Court of Appeal, however, treated this distinction as immaterial. The decision is far-reaching and may surprise some practitioners.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Leasehold Property (Temporary Provisions) Act, 1951—*premises reasonably required for demolition or reconstruction—must be immediate and primary purpose.*—In *J. W. Smart (Modern Shoe Repairs), Ltd.* v. *Hinckley and Leicestershire Building Society* [1952] 2 All E.R. 846 the question was whether the landlords could resist an application for the grant of a new tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, on the ground that they

reasonably required possession for purposes of demolition or reconstruction (section 12 (3) (c) of the Act). The facts showed that there was no immediate reconstruction in prospect. The landlords' primary purpose was to get possession of the premises occupied by tenants in order to enlarge their own offices. They had in mind structural adaptations but these were ancillary to their main purpose of enlarging their occupation. Demolition or reconstruction was not the immediate or primary purpose. It was held on this ground that the county court judge was right in deciding that the landlords had not brought themselves within section 12 (3) (c).

Forfeiture of lease—breach of covenant—prohibition of user other than as a private dwelling-house—prohibition of sub-letting of "the premises" without consent—sub-letting of part.—In *Dobbs* v. *Linford* [1952] 2 All E.R. 827 it was held that where a provision in a lease prohibiting the sub-letting of the premises without the landlord's consent was coupled with a prohibition against the use of the premises except as a private dwelling-house, the sub-letting of part of the premises without consent was a breach of covenant. The case of *Barton* v. *Keeble* [1928] Ch. 517 is an authority that sub-letting of rooms is a breach of covenant not to use except as a private dwelling-house. In view of the presence of the covenant in regard to user, there was no need for the covenant in regard to sub-letting to contain the words "or any part thereof" in order to cover sub-letting of a part as distinct from the sub-letting of the whole. The position is different where the covenant in regard to sub-letting stands alone.

(Woodfall, 24th ed., p. 600.)

Landlord and tenant or licensor and licensee—question of fact—licence by company—house belonging to director.—*Torbett* v. *Faulkner* [1952] 2 T.L.R. 659 is another case where the question was whether the transaction was the creation of a tenancy or the grant of a licence. The house in question belonged to the plaintiff, who was the director of a company. The agreement under which the defendant occupied the house (not a written agreement) was made with the company, not with the plaintiff. The defendant was employed by the company. The company got into difficulties and the defendant left its employment but refused to vacate the house, relying on the Rent Restrictions Acts. The county court judge found that the defendant was a mere licensee and the Court of Appeal refused to disturb his decision. The court pointed out that, apart from the specific finding that the defendant had only a personal right to occupy and not a tenancy, the company as such had no estate in the land and could only grant a licence to occupy. Its position was analogous to a requisitioning authority, which can confer a licence to occupy but cannot create a tenancy.

(Woodfall, 24th ed., p. 12.)

Yearly or weekly tenancy—construction of document—holding over.—The Court of Appeal in *Adler* v. *Blackman* [1952] W.N. 515 have affirmed the decision of Ormerod J., which was mentioned in these Notes for July–August, 1952 (*ante*, p. 306).

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4. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

Note:—Where a case is not reported in any of the general series of Law Reports it is cited from the Annotated Tax Cases (A.T.C.) or Taxation Reports (T.R.).

Income Tax

Higgs v. *Olivier* [1952] Ch. 311; [1952] T.R. 57 (C.A.).

The judgment of Harman J. (noted in Vol. 15, p. 366) was unanimously affirmed by the Court of Appeal, who refused leave to appeal to the House of Lords.

Kempster v. *McKenzie* [1952] T.R. 189; 31 A.T.C. 207 (Ch.D.).

(1) *Statutory provisions*: Sections 15, 16 and 17, the Income Tax Act, 1945; section 21 and para. 1 of Schedule 6 to the Finance Act, 1949.

(2) *Point*: Where there is evidence that plant or machinery is to be used for purposes other than those of the trade in question the Commissioners have a statutory duty to determine what proportion of that allowance is just and reasonable having regard to all the relevant circumstances. The determination involves issues of fact and, as in all cases falling to be decided upon their facts, the determination of the Commissioners is final, if there is evidence before them upon which or from which they could, as a matter of law, reach the decision which they did reach.

On the facts Danckwerts J. reversed the Commissioners' determination on the grounds that there was no evidence before them from which they were entitled to infer that the choice of the motor-car (in respect of which initial allowances were claimed) was dictated otherwise than by the requirements of the business of farming, carried on by the appellant taxpayer.

Recknell v. *C. I. R.* [1952] 2 All E.R. 147; [1952] T.R. 193; 31 A.T.C. 195 (Ch.D.).

(1) *Statutory provisions*: Section 14 (3) (b), the Income Tax Act, 1918; sections 47, 48, 49, the Finance Act, 1948.

(2) *Point*: Property may be attached to, or form part of the emoluments of, any office or employment (so that the income therefrom will be earned income) notwithstanding the fact that loss of the office or employment, by retirement, death or other event, will not automatically deprive the holder of the income arising from the property in question.

(3) *Facts and Decision*: The taxpayer was the registered holder of certain shares in a company, by whom he was employed, and was assessed to the Special Contribution in respect of income arising from these shares upon the footing that that income was "investment income" for the purposes of the levy. He appealed to the Special Commissioners upon the ground that the income was earned income, within the meaning of section 14 of the Income Tax Act, 1918, and hence exempt from the Special Contribution, but the Special Commissioners held that neither the shares nor the income therefrom formed part of his emoluments, within the meaning of section 14 (3) (b), *supra*.

The facts showed that the shares were made available on favourable terms to the taxpayer (in common with other senior employees) by way of incentive, and the company's articles of association provided that no such shares, which were "A" shares, should be issued to any person who was not a director or employee of the company; further, they limited the right of transfer and went on to provide as follows, *viz.*—

> "(iii) In the event of the holder of any 'A' shares ceasing by death, retirement, removal or otherwise to be a director, local director, manager or employee of the company, the executive committee of the company shall have the right at any time thereafter (but subject to the provisions of subclause (xi) of the articles) to arrange and call for or make a sale and transfer of all or any of the 'A' shares held by him subject to and in accordance with the following provisions of this article. Until the executive committee shall have arranged a sale of any such shares the same shall be retained by the holder or his personal representatives."

Held:—(reversing the Special Commissioners' determination) since it was by virtue of holding the employment that the taxpayer became qualified to acquire any "A" shares and as on retirement he would become disqualified (albeit not automatically) from holding those shares, that they were attached to the employment in question, with the result that the income arising therefrom was earned income within the meaning of section 14 (3) (b) of the Income Tax Act, 1918.

Thomas v. *Marshall* [1952] 2 All E.R. 32; [1952] T.R. 225 (C.A.).

(1) *Statutory provisions*: Section 21, the Finance Act, 1936.

(2) *Point*: The definition of the term settlement, contained in section 21 (9) (b) of the Finance Act, 1936, is wide enough to include and does include an absolute gift. *Hood-Barrs* v. *C. I. R.* [1946] 2 All E.R. 768; 27 T.C. 385 applied.

(3) *Facts and Decision*: The taxpayer, who had two infant and unmarried children, opened Post Office Savings Bank accounts in their names and from time to time placed sums to the credit of these accounts. The interest arising from each child's account in total exceeded £5 per annum but the interest arising from the separate sums deposited, as above indicated, did not.

The taxpayer was assessed to income tax in respect of the income arising from the deposits, pursuant to section 21 of the Finance Act, 1936. He appealed to the General Commissioners on the ground that the deposits being absolute gifts were not settlements, as defined. The Commissioners decided that they were bound by the decision in *Hood-Barrs* v. *C. I. R., supra,* and hence, that the deposits, even though gifts, were "settlements"; they further held, however, that the several sums paid by the taxpayer were separate settlements, and as a consequence that so much of the interest that arose from each such sum as did not exceed £5 per annum could not be treated as the settlor's income in view of the provisions of subsection (4) of section 21. The aggregate there referred to was the aggregate amount of income under each settlement, separately regarded.

Both the Crown and the taxpayer appealed to the High Court.

Donovan J., dismissing the taxpayer's appeal, applied the decision in *Hood-Barrs* v. *C. I. R., supra*; he reversed the Commissioners' determination, however, on the point as to aggregation, holding that where there was more than one settlement, subsection (4) of section 21 referred to the aggregate amount of the income arising under all settlements.

Held:—(affirming the decision of Donovan J.) that an absolute gift in these circumstances was a settlement within the provisions of section 21 (9) (b), *supra*. (No appeal was lodged against the decision of the High Court upon the question of aggregation.)

Leave to appeal to the House of Lords granted.

James Snook & Co., Ltd. v. *Blasdale* [1952] T.R. 233; 31 A.T.C. 268 (C.A.).

The judgment of Donovan J. (noted, *ante*, p. 146) was unanimously affirmed by the Court of Appeal, who refused leave to appeal to the House of Lords.

Bentleys, Stokes & Lowless v. *Beeson* [1952] 2 All E.R. 82; [1952] T.R. 239 (C.A.).

The judgment of Roxburgh J. (noted in Vol. 15, p. 369) was unanimously affirmed by the Court of Appeal, who granted leave to appeal to the House of Lords.

Dale & Others v. *C. I. R.* [1952] A.C. 704; [1952] 2 All E.R. 89; [1952] T.R. 249 (C.A.).

(1) *Statutory provisions*: Section 14 (3) (a), the Income Tax Act, 1918; section 47 (1), the Finance Act, 1948.

(2) *Point*: The office of trustee is not an office of profit. If, therefore, a testator attaches remuneration to the trusteeship of his will such remuneration is bounty, and that bounty derives from the testator and not from the office of trustee. *Baxendale* v. *Murphy* [1924] 2 K.B. 484 considered and applied.

(3) *Facts and Decision*: The appellant taxpayer was appointed trustee of the Wellcome Foundation by the will of Sir Henry Wellcome, deceased. The duties were onerous and the will accordingly provided for the payment of £1,000 per annum free of tax to the appellant so long as he continued as trustee.

The appellant was assessed to Special Contribution on the footing that his income as trustee was investment income and not earned income. The Special Commissioners on appeal decided that in view of the decisions in *Baxendale* v. *Murphy, supra,* and *Hearn* v. *Morgan,* 26 T.C. 478 (to the effect that the remuneration of a trustee could not be directly assessed under Schedule E) they must hold that such remuneration could not arise from an office of profit within section 14 (3) (a) of the Income Tax Act, 1918, and *ex hypothesi* was not earned income. Their decision was reversed by Harman J., who held that the remuneration of Sir Henry Dale was in the circumstances earned income.

Held:—(reversing the judgment of Harman J.) that the Special Commissioners' determination was correct.

Leave to appeal to the House of Lords granted.

Chibbett v. *Harold Brookfield & Son, Ltd.* [1952] 2 All E.R. 265; [1952] T.R. 257 (C.A.).

The decision of Donovan J. (noted, *ante,* p. 76) (affirming the Special Commissioners) was reversed. Leave to appeal to the House of Lords granted.

The decision in *John Cronk & Son, Ltd.* v. *Harrison* [1937] A.C. 185 considered and explained.

Corporation of London (as Conservators of Epping Forest) v. *C. I. R.* [1952] T.R. 269; 31 A.T.C. 292 (C.A.).

(1) *Statutory provisions*: Sections 31, 33, 39, 41, 42, the Epping Forest Act, 1878; General Rule 19 and Case III of Schedule D, the Income Tax Act, 1918.

(2) *Point*: A periodical payment which cannot—as a matter of law—form part of the recipient's profits or gains, since by some specialty of law he is incapable of so conducting his affairs as to produce profits or gains chargeable to income tax, must be pure income

profit, that is to say, an annual payment charged under Case III of Schedule D by deduction of tax at source.

(3) *Facts and Decision*: The Corporation of the City of London were charged with certain duties under the Epping Forest Act, 1878, *viz.*:

(a) the management and control of the Forest through a body to be constituted under the authority of the Corporation and to be known as Conservators;

(b) the obligation to contribute to a fund of income, constituted by the Act for the purposes of the Forest, such annual sum as should be necessary, in effect, to balance the income expenditure of the Conservators.

For the purposes of the appeal it was agreed that the Corporation and the Conservators were separate entities at law.

Payments by the Corporation, for the purposes above indicated, had been made for many years, and in the year 1948–49 in pursuit of this statutory duty, the Corporation paid the sum of £16,006 under deduction of income tax at the standard rate.

It was the first time that the Corporation has claimed and exercised the right to deduct tax.

The Conservators had at all material times been accepted as a charity and as such claimed repayment of the tax deducted by the Corporation, the Commissioners of Inland Revenue refused the repayment claim and, as a consequence, the Conservators appealed. The Special Commissioners found for the Conservators on the grounds that the payment was legally exigible, had the quality of recurrence and was "pure income profit," in short, that the sum was an annual payment within Case III of Schedule D, *supra*. From this decision the Commissioners of Inland Revenue appealed to the High Court and succeeded before Donovan J., who reversed the Special Commissioners' determination.

Held:—(reversing the judgment of Donovan J., and restoring the Special Commissioners' determination) that the sum of £16,006 paid in the year 1948–49 was an annual payment proper, that, as a consequence, the payer, *i.e.*, the Corporation, was entitled to deduct tax on payment, and as a charity the Conservators were therefore entitled to repayment of tax so deducted.

Leave to appeal to the House of Lords granted.

Lawrie v. *C. I. R.* [1952] T.R. 305; 31 A.T.C. 327 (C.S.).

(1) *Statutory provisions*: Rules 3 (d) and (g) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Expenditure upon the reconstruction of business premises, where that reconstruction is undertaken in lieu of repairs, is none the less prohibited as a deduction in computing profits. It is not permissible to dissect and apportion the capital so expended in order to show that the amount or part which would have been spent in repair is therefore notionally to be treated as having been expended

upon repair. *Margrett* v. *Lowestoft Water and Gas Co.*, 19 T.C. 481 applied.

C. I. R. v. *Guthrie* [1952] T.R. 315; 1952 S.L.T. 376 (C.S.).

(1) *Statutory provisions*: Section 15, the Income Tax Act, 1945.

(2) *Point*: Section 15, *supra*, confers the right to an initial allowance to a person carrying on a trade who

"incurs capital expenditure on the provision of machinery or plant for the purposes of the trade."

Where there has been bona fide expenditure of capital for the purposes indicated, relief must be given in accordance with the provisions of the section, although the expenditure proves abortive, in that delivery of the plant or machinery in question is not and cannot be secured.

(3) *Facts and Decision*: The taxpayer had paid a sum of £1,144 towards the purchase price of a car required for the purposes of his trade; he was unable to obtain delivery of the car, and, as the seller became insolvent, unable to obtain repayment of the sum so disbursed.

On a claim made under section 15 of the Income Tax Act, 1945, to capital allowances in respect of the expenditure of £1,144, the Revenue refused relief and the taxpayer accordingly appealed to the Special Commissioners, who allowed the appeal holding that the word "provision" in section 15 (1) of the Income Tax Act, 1945, meant something less than acquisition and as a consequence that the taxpayer was entitled to the initial allowance. From this determination the Crown appealed.

Held (affirming the Special Commissioners' determination): that the conditions of section 15, *supra*, were satisfied and the allowance must therefore be granted.

Wilson's (Dunblane), Ltd. v. *C. I. R.* [1952] T.R. 317; 31 A.T.C. 339 (C.S.).

(1) *Statutory provisions*: Section 59, the Income Tax Act, 1945.

(2) *Point*: Notwithstanding that the requisite degree of control, of a seller over a buyer, exists, in accordance with subsection (1) of section 59, *supra*, a sale of plant and machinery at a price which is shown to be the open market price will not fall within the mischief of subsection (3) of section 59, and so restrict the capital allowances to the buyer to the "limit of recharge," since the necessary condition of application prescribed by subsection (2), namely, that the property is one sold "at a price other than that which it would have fetched if sold in the open market" is manifestly not satisfied.

Albion Rovers Football Club, Ltd. v. *C. I. R.* [1952] T.R. 327; 30 A.T.C. 68 (H.L.).

(1) *Statutory provisions*: Case I of Schedule D, the Income Tax Act, 1918.

(2) *Point*: As a general rule revenue disbursements by a trader are deductible as expenses of the accounting period in which paid. The House of Lords, reversing the Court of Session and restoring the determination of the Special Commissioners, held that the terms of what was admittedly a highly special form of contract *inter partes* did not alter or derogate from the general principle above stated.

Lilley v. *Harrison* [1952] T.R. 333; 31 A.T.C. 365 (H.L.).

The judgment of the Court of Appeal (noted in Vol. 15, p. 132) was unanimously affirmed by the House of Lords.

Mackenzie v. *Arnold* [1952] T.R. 337; 31 A.T.C. 369 (C.A.).

(1) *Statutory provisions*: Case II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Moneys received by an author for the sale of copyright in his books is an income receipt of the year in which it is received and this will be so notwithstanding the fact that in the past it has been normal for the author, in the exercise of his profession, to realise profit upon his books by means of continuing royalties. *Howson* v. *Monsell* [1950] 2 All E.R. 1239; 31 T.C. 529, applied.

MacIntosh v. *Manchester Corporation* [1952] 2 All E.R. 385; 31 A.T.C. 372 (C.A.).

(1) *Statutory provisions*: Section 14, the Income Tax Act, 1945.

(2) *Point*: The words " preparing," " cutting," " tunnelling " and " levelling " in subsection (1) of section 14, *supra*, are descriptive of processes applied to land and do not describe the results or consequences of operating those processes.

Leave to appeal to the House of Lords refused.

Bray v. *Colenbrander* [1952] T.R. 355; 31 A.T.C. 382 (C.A.).

(1) *Statutory provisions*: Cases II and V of Schedule D and Schedule E, the Income Tax Act, 1918; section 18, the Finance Act, 1922.

(2) *Point*: So long as the decision of the Court of Appeal in *Bennett* v. *Marshall* [1938] 1 K.B. 591; 22 T.C. 73 stands, remuneration received for services performed in the United Kingdom under a contract of employment (a) made abroad, and (b) which by its terms provides for the remuneration to be payable abroad, is not assessable to United Kingdom income tax under Schedule E, but under Case V

of Schedule D only, that is to say, upon the basis of the amounts remitted to this country.

(3) *Facts and Decision*: The taxpayer, a Dutch journalist, was employed as London correspondent by a Dutch newspaper; there was no dispute that the contract of employment, which was oral, was made in Holland, provided for the services to be rendered in London and for the remuneration to be "payable in Holland." In the event, Mr. Colenbrander's wife and child remained resident in Holland, and, by arrangement with his employer, part of his salary was paid direct to the wife, and the balance only remitted to him to this country.

Mr. Colenbrander was at all material times resident in the United Kingdom.

The Crown raised assessments, upon the basis that the whole of the remuneration was assessable under Schedule E, as arising from a public office or employment of profit within the United Kingdom, or alternatively, under Case II of Schedule D (being chargeable under Schedule E by virtue of section 18 of the Finance Act, 1922), that is to say, in respect of the profits arising from "a profession, employment or vocation."

The taxpayer maintained that he was liable to assessment in this country upon the remittance basis only. Both the Special Commissioners and Danckwerts J. gave for the taxpayer.

In the Court of Appeal the Crown, against appellant, abandoned the point that the taxpayer held a public office chargeable under Schedule E, but pursued the claim under Case II of Schedule D, and, additionally, sought to distinguish the case on its facts, from the principle laid down in *Bennett* v. *Marshall, supra.*

Held:—(affirming the determination of the Special Commissioners and the judgment of Danckwerts J.) that the taxpayer was assessable on the basis of income remissions only.

(The case is under appeal to the House of Lords.)

Harvey v. *Breyfogle* [1952] T.R. 361; 31 A.T.C. 386 (C.A.).

(1) *Statutory provisions*: Cases II and V of Schedule D and Schedule E, the Income Tax Act, 1918; section 18, the Finance Act, 1922.

(2) *Point*: Another case where services are performed in the United Kingdom under a contract of employment made abroad, which provides for the remuneration to be paid abroad.

The Court of Appeal, having read the stated case, decided that it was bound by the principle in *Bennett* v. *Marshall* [1938] 1 K.B. 591; 22 T.C. 73, to dismiss the Crown's appeal.

(Leave to appeal to the House of Lords granted.)

Barron v. *Littman* [1952] 2 All E.R. 548; [1952] T.R. 363 (H.L.).

The House of Lords unanimously affirmed the judgment of the Court of Appeal (noted in Vol. 15, p. 291).

Re Batley [1952] Ch. 781; [1952] 2 All E.R. 562; [1952] T.R. 389 (C.A.).

(1) *Statutory provisions*: Sections 354 and 355, the Income Tax Act, 1952.

(2) *Point*: The bequest to a life tenant of a stated proportion of residue, expressed to be from the fund after it has suffered income tax in the hands of the trustees, is not a bequest to which the rule in *Re Pettit* [1922] 2 Ch. 765 can apply.

(3) *Facts and Decision*: A testator by his will bequeathed an annuity to his former wife for life, and upon a proper construction of the will it was held by the Court of Appeal that this annuity was payable free of tax. The annuitant remarried, and upon a further construction summons Vaisey J. held that she was bound to account for income tax reliefs in accordance with the rule in *Re Pettit, supra*, and applying *Re Kingcome* [1936] Ch. 566, that her duty as trustee of this statutory right (to recover tax overpaid) extended, should that prove necessary, to a demand for assessment separate from her husband in accordance with section 355 of the Income Tax Act, 1952.

In the Court of Appeal it appeared upon the facts that one-third of the residuary income (and not an annuity) had become payable to Mrs. Hert (the former wife). The testator had provided:

> "if at any time during the lifetime of my wife such annuity should exceed the amount of one-third of the total income of my estate, after payment of income tax, then the amount to be paid to the said (Mrs. Hert) by way of such annuity shall be such one-third of the total income of my estate after payment of income tax, etc."

Held: that the bequest was a bequest of one-third of the net income of residue, that the rule in *Re Pettit, supra*, had no application, and accordingly, there was no obligation upon the former wife to account.

(The court indicated their agreement with the views of Vaisey J., *supra*, upon the duties of an annuitant to account.)

Newsom v. *Robertson* [1952] 2 All E.R. 728; [1952] T.R. 401 (C.A.).

The Court of Appeal unanimously affirmed the judgment of Danckwerts J. (noted, *ante*, p. 232), and refused leave to appeal to the House of Lords.

Re Wright; *Barclays Bank, Ltd.* v. *Wright* [1952] 2 All E.R. 698; [1952] T.R. 429 (Ch.D.).

(1) *Point*: A clear expression of intention is required in order to free an annuitant from the burden of income tax upon his annuity; a direction to pay a "net" sum will not suffice.

(2) *Facts and Decision*: A testator by his will made the following provision for one Henrietta Wear;

> "to set aside and appropriate (out of residue) another sum sufficient at the time of such appropriation to produce a net income of £10 per week and I direct the Bank and my Trustee to pay such income to the said Henrietta Wear during her life or until she shall marry."

The annuitant maintained that she was entitled to an annuity of £10 per week, free of tax, during life or until she should marry.

Held:—in the absence of other sufficient context in the will the use of the word "net" did not free the annuitant from the burden of income tax upon the annuity.

PROFITS TAX

C. I. R. v. *Chappie, Ltd.* (1952) 31 A.T.C. 257; [1952] T.R. 205 (Ch.D.).

(1) *Statutory provisions*: Sections 35 and 36 (1) (c), the Finance Act, 1947.

(2) *Point*: A loan made to a member, although repayable upon commercial terms as to interest and security is none the less a "benefit" within subsection (1) of section 36, *supra*, and it follows a distribution.

(3) *Facts and Decision*: At all material times the taxpayer was a United Kingdom corporation and was "director controlled." The taxpayer caused a company to be incorporated in Eire, known as Chappie (Ireland), Ltd., to carry on a branch of its business in that country; at the material times the Irish company held shares in the English corporation.

The transaction giving rise to the appeal was the advance on loan by the English company to Chappie (Ireland), Ltd., of the sum of £35,000 made upon the security of certified debentures of £1,000 each carrying interest at the rate of 5 per cent. per annum. It was found as a fact that this transaction was a commercial transaction in all respects.

The Revenue raised assessment upon the taxpayer in the view that the loan of £35,000 was a "distribution to members" for profits tax purposes and hence a relevant distribution.

Held (reversing the Special Commissioners' determination):—that the loan was an amount applied for the benefit of the Irish company within the meaning of section 36 (1) (c), *supra*.

St. Aubyn v. *Att.-Gen.* [1952] A.C. 15 considered.

Bourne & Hollingsworth, Ltd. v. *C. I. R.* (1952) 31 A.T.C. 174; [1952] T.R. 99 (Ch.D.).

(1) *Statutory provisions*: Sections 35 and 36, the Finance Act, 1947.

(2) *Point*: (i) A dividend paid from capital profits is nevertheless a relevant distribution for profits tax purposes: *Lamson Paragon Supply Co., Ltd.* v. *C. I. R.*, 32 T.C. 302, followed.

(ii) Where the resolution declaring the dividend specifies no period to which or to the profits of which it is to be related, an understanding of the members that it is related to some specific period will not suffice. There must be an expression, *by the company*, of the period for which the dividend is declared.

STAMP DUTY

The Nestle Co., Ltd. v. *C. I. R.* [1952] 1 All E.R. 1388; (1952) 31 A.T.C. 28 (Ch.D.).

(1) *Statutory provisions*: Section 112, the Finance Act, 1891; section 55, the Finance Act, 1927.

(2) *Point*: the relief from companies capital duty accorded by section 55, *supra*, is only available where the "existing company" is a company incorporated under the laws of Great Britain.

(3) *Facts and Decision*: The appellant company, incorporated in Great Britain, increased its capital from £2,300,000 to £5,710,000 by the creation of 3,410,000 shares of £1 each. The increase in capital was for the purpose of acquiring shares in four other companies, two of them incorporated in England and the remaining two in Northern Ireland.

It was conceded that so far as the transaction related to the companies incorporated in England relief from companies capital duty was to be given in accordance with section 55 of the Finance Act, 1927. As regards the Northern Ireland companies the Inland Revenue refused the relief on the ground that section 55 granted relief only in the case of *transferor* companies incorporated in Great Britain.

Held:—that the words "any particular existing company" in section 55 (1) (b), *supra*, extended to companies incorporated in Great Britain only and as a consequence that the appellant company's claim must be dismissed.

ESTATE DUTY

Re Howell; *Drury* v. *Fletcher* [1952] Ch. 264; [1952] 1 All E.R. 368 (Ch.D.).

(1) *Statutory provisions*: Section 2, the Finance Act, 1894; section 14, the Finance Act, 1914.

(2) *Point*: Any exoneration from death duties which a testator may confer by his will will apply only to exoneration from duty payable at the death of the testator himself, and not to duty which

may be exigible in the future by reason of the dispositions of the will, unless in that will there is a clear indication to the contrary.

(3) *Facts and Decision*: The testatrix by her will devised a freehold house to her trustees upon trust to pay the income arising therefrom to a niece for life and after the niece's death upon trust for the niece's son, absolutely. The will directed that "all legacies and bequests and all devises given by this my will (except the gift of residue) shall be enjoyed free of death duties." The testatrix gave the residue of her estate to her trustees, after payment of debts, funeral and testamentary expenses and death duties, for her nieces, in equal shares absolutely.

The trustees issued a summons to determine whether the direction contained in the will that all legacies, bequests and devises should be enjoyed free of death duties applied so as to exonerate the freehold house from estate duty payable on the death of the tenant for life (the niece), in which event the distribution of residue had necessarily to be postponed.

Held:—In the absence of some clear direction that distribution of the estate was to be deferred pending the payment of estate duty due upon this future event (and the testatrix had given no such direction) the duty must be payable out of the property, *i.e.*, the freehold house, upon which it was charged.

Re Rose; *Rose* v. *C. I. R.* [1952] Ch. 499; [1952] 1 All E.R. 1217 (C.A.).

The Court of Appeal unanimously affirmed the judgment of Roxburgh J. Leave to appeal to the House of Lords refused.

(For report of proceedings in the Ch.D. see The Conveyancer, Vol. 16, No. 1, at p. 77.)

Re Lambton's Marriage Settlement; *May* v. *C. I. R.* [1952] Ch. 752 [1952] 2 All E.R. 201 (C.A.).

(1) *Statutory provisions*: Sections 1 and 5 (3), the Finance Act, 1894; section 48, the Finance Act, 1938.

(2) *Point*: Where property passes under section 1, *supra*, upon the death of a life tenant no deduction can be made from the principal value in respect of an annuity payable out of that property, or its income, which ceases on that death.

Att.-Gen. v. *Glossop* [1907] 1 K.B. 163 can no longer be regarded as good law.

(3) *Facts and Decision*: By a marriage settlement made in 1912 the husband settled property upon trust;

(i) during the joint lives of husband and wife to pay an annuity of £400 per annum to the wife, and the balance of income to the husband;

(ii) the income of the whole to be paid to the surviving spouse during his or her life;

(iii) subject to the spouses' life interests with remainders over to the issue of the marriage.

The husband died in 1949 leaving the wife surviving and on his death the Crown claimed duty on the entirety of the settled fund under section 1 of the Finance Act, 1894. The trustees maintained that on the principle laid down in *Att.-Gen.* v. *Glossop, supra,* the whole of the funds did not pass but only their value less so much as was required by its income to produce the wife's annuity of £400 per annum.

Held (affirming the judgment of Harman J.):—(i) that the husband's death occasioned a change in the beneficial title to the income of the settled property as a whole, and, as a consequence the whole passed under section 1 of the Finance Act, 1894. *Earl Cowley* v. *C. I. R.* [1899] A.C. 198 as interpreted in *De Trafford* v. *Att.-Gen.* [1935] A.C. 280 applied.

(ii) That the failure of the husband's contingent interest in that part of the income represented by the wife's annuity, by reason of his death, did not occasion the passing of the settled property which passed under section 1, *supra,* and not under section 2 of the Finance Act, 1894. As a consequence no exemption could be obtained under section 5 (3) of the Finance Act, 1894, as amended by section 48 of the Finance Act, 1938.

(iii) *Per* Sir Raymond Evershed M.R., *obiter*: the exemption under section 5 (3), *supra,* as amended, is limited to cases where the potential charge for duty lies under section 2 (1) (b) of the Finance Act, 1894.

(The case is under appeal to the House of Lords.)

Re J. Bibby & Sons, Ltd., Pensions Trust Deed; *Davies* v. *C. I. R.* [1952] 2 All E.R. 483; (1952) 31 A.T.C. 355 (Ch.D.).

(1) *Statutory provisions*: Section 2 (1) (d), the Finance Act, 1894.

(2) *Point*: The right to be considered as an object of trustees' bounty is not property within the meaning of that word as used in section 2 of the Finance Act, 1894. *Re Miller's Agreement* [1947] Ch. 615 applied.

(3) *Facts and Decision*: In 1898 one Davies entered the employ of J. Bibby & Sons, Ltd., and remained in the employment of that company until his death in 1942. In 1924 the company adopted a non-contributory pension scheme for the benefit of retired employees of the company, and their widows and children. Upon the true construction of the trust it was held that the trustees had an absolute discretion either to give or to withhold a pension according to their views on the desirability of paying it.

In the event and shortly after the death of Davies his widow, the plaintiff, was granted a pension by the trustees, and the Inland Revenue claimed estate duty in respect of the pension awarded upon the footing that it was an annuity purchased or provided by the deceased within section 2 (1) (d) of the Finance Act, 1894.

Held:—(i) that having regard to the trustees' discretion the pension was not property within the meaning of section 2 of the Finance Act, 1894.

(ii) Again, that having regard to the trustees' discretion the widow had no enforceable right and as a consequence no beneficial interest within section 2 (1) (d), *supra*. *Re Miller's Agreement* applied.

(iii) That in the absence of some evidence that the provision of the pension had formed the subject-matter of bargain between the deceased and the company it was not an annuity purchased or provided by him, but was the result of the gratuitous act of the company.

The Crown's claim was accordingly dismissed.

Re The Duke of Devonshire's Settlement (1952) 21 A.T.C. 399; [1952] T.R. 375 (Ch.D.).

(1) *Statutory provisions*: Section 55, the Finance Act, 1940; section 28, the Finance Act, 1949.

(2) *Point*:

(i) The agricultural rate does not apply to shares in a company which holds agricultural property, although by reason of the degree of control (possessed by the deceased) the shares must be valued by reference to the company's assets.

(ii) *Semble*. Section 55 of the Finance Act, 1940, applies to shares deemed to pass at the death (under section 2 of the Finance Act, 1894), equally with those actually passing.

Re Longbourne's Marriage Settlement, Warren v. *C. I. R.* [1952] 2 All E.R. 933; [1952] T.R. 435 (Ch.D.).

(1) *Statutory provisions*: Sections 1 and 2 (1) (b), the Finance Act, 1894.

(2) *Point*: Where income under a settlement is held upon trust to pay an annuity or other fixed sum, and subject thereto to pay the balance to A, on A's death there is a passing of the whole of the settled property. *Re Lambton's Marriage Settlement* [1952] 2 All E.R. 201 applied.

(3) *Facts and Decision*: Under a marriage settlement made in 1907 the property settled by the wife was held upon the trusts following:

(a) out of the annual income to pay the husband £1,000 per annum during his life, and,

(b) subject thereto to pay the annual income to the wife for life, and,

(c) after her death as to capital and income for the children of the marriage absolutely.

The wife died in 1946 leaving the husband and one child of the marriage surviving.

Held:—the whole settled property passed on the wife's death under section 1, and as a consequence there was no right to deduct (from the value of the property so passing) the share required by its income to produce the husband's annuity.

(Conceded that a deduction could be made equivalent to the actuarial value of the annuity at the wife's death, but it would appear this treatment rests upon concession only, *cf.*, *per* Wynn-Parry J., at p. 937 of the report.)

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5. *MISCELLANEOUS*

Matrimonial home—purchase-money put up in unequal shares.—In *Rimmer* v. *Rimmer* [1952] 2 T.L.R. 767 a husband and wife purchased a house in 1933 for £460. The wife put up the deposit of £29 and the balance was provided by a loan from a building society. The conveyance was taken in the husband's name and he alone was liable on the mortgage. The mortgage was in due course paid off, £151 being provided by the husband and £280 by the wife. The house was sold this year for £2,117 and a dispute arose over the division of the sale price, which dispute came before the county court under the Married Women's Property Act, 1882, s. 17. The registrar thought the money should be divided in the proportion to the amounts provided by the parties; on appeal the county court judge thought it should be divided between the parties in the proportions originally put up, treating the money advanced by the building society as put up by the husband, subject to the wife first being recouped the £280 which she had subsequently provided. The Court of Appeal held that the money should be divided equally. Apparently the wife did not attempt to argue that she provided the purchase-money and that therefore there was a resulting trust in her favour (*Dyer* v. *Dyer* (1788) 2 Cox Eq. 92) and that the sale price belonged to her entirely, subject to a lien in favour of the husband for the amount provided by him (*Outram* v. *Hyde* (1875) 24 W.R. 268). Once it was conceded that the property belonged to them jointly, it was a question of applying the principle enunciated in *Re Rogers' Question* [1948] 1 All E.R. 328 in these terms: "What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself."

Where there is a common fund into which the husband and wife both put sums from time to time the balance prima facie belongs to both parties jointly (*Jones* v. *Maynard* [1951] Ch. 572). In the instant case, where, as in *Jones* v. *Maynard*, both parties were earning and contributing to the home, there was nothing to show that the parties ever had in mind that the property belonged to them in any

particular shares and so the principle, equality is equity, was applied. In *Re Rogers' Question, supra,* there was evidence to show that the wife's share put up at the time of the purchase was intended to be her sole contribution, so that it was fair to divide the sale price in proportion to the respective amounts contributed; and there may well be other cases where the circumstances will show that the respective amounts contributed will conclude the question. Romer L.J. summarises the court's decision in the instant case, at p. 774, in these terms: "It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations, either at law or in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application." We imagine the first of these principles to be really in the nature of a reminder that "the ordinary incidents of commerce have no application in the ordinary relations between husband and wife"; we do not think it was intended to suggest that the established principles relating to resulting trusts, advancement and equitable liens, as between husband and wife are in any way affected.

Arrangement for joint purchase—party acting on faith of arrangement—no concluded agreement—effect of purchase by one party.—In *Pallant* v. *Morgan* [1952] 2 T.L.R. 813 certain woodlands were to be sold by auction and two adjoining occupiers, the plaintiff and the defendant, wished to ensure that the timber did not get into commercial hands for felling. Accordingly, some negotiations took place with a view to a joint purchase, the property to be split after purchase between the parties. The terms of the division did not reach finality but, as a result of the negotiations, an arrangement was reached whereby the plaintiff's agent agreed not to bid on the faith of an assurance from the defendant's agent that if he refrained the defendant, after purchase, would convey certain parts of the woodlands to the plaintiff at a price still to be decided. The defendant purchased the woodlands but declined to convey any part to the plaintiff. The plaintiff sued for specific performance. The court found that there was no sufficient certainty on the terms of the arrangement for it to decree specific performance but, following *Chattock* v. *Muller* (1878) 8 Ch.D. 177, held that the defendant's agent took part in the auction partly on the defendant's account and partly as agent for the plaintiff and that it would be a fraud on the part of the defendant to seek to retain the woodlands for himself alone. There was an agreement that when the property was purchased the parties should come to an arrangement on its division; as the parties had not come to an arrangement—and the court could not compel them to do so—the defendant held the property for himself and the plaintiff jointly.

THE LIBRARY

Konstam on Income Tax—First Supplement to the Twelfth Edition. Sweet & Maxwell. (5s.)

This brief but useful Supplement brings the text of the Twelfth Edition of "Konstam" up to date, that is to say to July 31, 1952, by combining explanatory notes upon the provisions of the Finance Act, 1952, with references to the numerous judicial decisions promulgated in the six months' period between the date of the Twelfth Edition and the present Supplement—and their effect.

D. M.

Hanson's Death Duties—Fifth Cumulative Supplement to the Ninth Edition. Sweet & Maxwell. (20s.)

As its title indicates, the Supplement is cumulative incorporating, as it does, changes in the estate duty law and practice which have taken place in the six years which have elapsed from the date of publication of the Ninth Edition, to September 13, 1952.

The work embraces substantially,

(a) necessary addenda to the annotation of the principal volume arising chiefly upon a careful analysis of the many decisions of the courts, and,

(b) the text of the Finance Acts, 1946 to 1952 (in so far as relevant to estate duty) annotated in the same detailed manner as in the principal volume.

D. M.

Dymond's Death Duties—Second Cumulative Supplement to the Eleventh Edition. Solicitors' Law Stationery Society. (8s. 6d.)

It is natural to have a preference for the familiar, and as it happens the work on estate duty with which the reviewer is most familiar is not Dymond. However, I would like to say that in this Supplement, I have found as clear and able a presentation of the case law relevant to a difficult and complex subject-matter as could be desired.

The Supplement is in essence an amplification of the text of the Eleventh Edition in the light of the judicial decisions of the past two years.

D. M.

We have also received:—

Intestates' Estates and Family Provision. By D. C. Potter, LL.B., Barrister-at-Law. Current Law Guide, No. 9. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 74 pp. (8s. 6d.). The Intestates' Estates Act, 1952, drastically alters the law of intestate succession with effect from January 1, 1953, and applies the Inheritance (Family Provision) Act, 1938, to intestacy. This guide sets forth the law on intestate succession and family provision generally and does not confine itself to the amendments; nor, we are glad to say, does it take the form of setting forth the statutes section by section and commenting on the text. There are a series of examples of the workings of

the new rules and the text of the 1952 Act is given. Schedules to the 1952 Act set forth the text of the Administration of Estates Act, 1925, ss. 46 to 49, as amended, and the Inheritance (Family Provision) Act, 1938, as amended. Although the guide has appeared promptly, nevertheless it is well written and the ground is fully covered.

[We regret that the review of *Coulson and Forbes on Waters* on p. 392, *ante,* was attributed to J. F. G. instead of J. S.]

PRECEDENTS

Form 1

Form of Agreement for Surrender of Agricultural Tenancy (*a*).

(*Drafted by Dennis B. Pugh, Barrister-at-Law*)

AN AGREEMENT made this —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord") of the one part and B. of *etc.* (hereinafter called "the Tenant") of the other part SUPPLEMENTAL TO a Tenancy Agreement [*insert short particulars of Tenancy Agreement*].

WHEREAS:

A. The Tenant has agreed with the Landlord for the surrender to him of the holding comprised in the said Tenancy Agreement upon the terms hereinafter expressed.

B. The Tenant has agreed to accept from the Landlord the sum of £—— in respect of compensation for disturbance to

(*a*) It is becoming increasingly difficult for owners of farms to get possession by means of an effective notice to quit, owing to the reluctance of the Committee to give their consent, but in some cases the tenant may be willing to be bought out, and this form is intended to provide for such a case. The parties cannot contract out of the Act (s. 65); but there is nothing to prevent either party from claiming compensation for anything not provided for by the Act though such claim is, except as expressly mentioned in subs. (2), only enforceable under an agreement in writing. S. 70 (3) provides that the parties may, within the period of four months from the termination of the tenancy, by agreement in writing, settle any claim by either of them against the other instead of referring the matter to arbitration, but it is apprehended that if the tenant's claims are settled by an agreement in writing made before the termination of the tenancy, and the amount of the compensation has been properly arrived at by qualified valuers, he could not very well go back on that agreement. For a general statement of the rights of an outgoing tenant reference should be made to the articles by J. Muir Watt, barrister-at-law, at pp. 15, 170 & 289 of Vol. 12, and p. 358 of Vol. 14, of this journal.

which he is entitled under the provisions of section 34 of the Agricultural Holdings Act 1948 (*b*).

C. The Tenant has carried out upon the said holding the improvements specified in the [First and Second parts of the] First Schedule hereto (being improvements of such a nature as are specified in the [Second and] Third Schedule[s] to the said Act) and it has been agreed pursuant to a valuation made in that behalf that the amount of compensation computed in accordance with the provisions of the said Act payable by the Landlord to the Tenant in respect of such improvements is the sum of £—— (*c*).

D. The Tenant has erected upon the said holding the fixtures and buildings specified in the Second Schedule hereto [and it has been agreed pursuant to a valuation made in that behalf that the fair value of such fixtures and buildings to an incoming tenant of the said holding is the sum of £—— (*d*)].

NOW THEREFORE IT IS HEREBY AGREED AND DECLARED as follows:—

(*b*) In the case of the termination of a tenancy by reason of a notice to quit, compensation for disturbance is assessed on the loss or expense directly attributable to the sale or removal of the tenants' effects; and these costs are to be computed as equal to the value of one year's rent of the holding, unless they can be proved to be greater, in which case the amount payable is to be increased to the full amount of the costs, but in any case not exceeding two years rent of the holding (s. 34 (2)). However, where the tenant is being bought out, he will presumably be offered more than his strict rights, so there will be no need for any valuation.

(*c*) The improvements specified in the Second Schedule to the Act are "old" improvements begun before March 1, 1948 (s. 35); and the measure of compensation therefor is such a sum as fairly represents the value thereof to an incoming tenant (s. 37). The improvements specified in the Third Schedule to the Act are long-term "new" improvements; begun on or after March 1, 1948 (s. 46); and the measure of compensation therefor is an amount equal to the increase attributable to the improvement in the value of the agricultural holding as a holding, having regard to the character and situation of the holding and the average requirements of tenants reasonably skilled in husbandry (s. 48). Recital C, clause 2 of, and the First Schedule to the Form, will, of course, have to be adapted to suit the circumstances of the case.

(*d*) S. 13 of the Act provides that, subject to the conditions therein contained, certain fixtures and buildings can be removed by the tenant during the continuance of the tenancy or before the expiration of two months from the termination thereof, and shall remain the property of the tenant so long as he may so remove them; but the landlord may elect

1. In consideration of the agreement on the part of the Landlord hereinafter expressed the Tenant hereby AGREES with the Landlord to quit and deliver up vacant possession of the said holding to him on the —— day of —— next to the intent that the same premises shall as from such date be discharged from all the provisions of the said Tenancy Agreement.

2. The Landlord hereby AGREES with the Tenant to pay to him upon his quitting and delivering up possession of the premises as aforesaid the following sums namely the said sum of £—— in respect of compensation for disturbance (*b*) and the said sum of £—— in respect of compensation for the said improvements specified in the [First and Second parts of the] said First Schedule hereto (*c*).

3. The Tenant hereby AGREES to accept the said respective sums of £—— and £—— in full satisfaction of all claims whatsoever which as an outgoing tenant according to the provisions contained in the said Tenancy Agreement or in the said Act or otherwise he has or could have in respect of the said holding (*e*) other than compensation for improvements of such a nature as are specified in Part I of the Fourth Schedule to the said Act and for matters of such a nature as fall within Part II of that Schedule which last-mentioned compensation shall be calculated in accordance with the Regulations for the time being in force made under the provisions of section 51 of the said Act (*f*).

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to purchase them at their fair value to an incoming tenant of the holding. Recital D, and clause 6 of the Form should accordingly be adapted according as to whether it is agreed that the tenant is to remove the fixtures and buildings or the landlord is to buy them.

(*e*) If the tenant has a claim for compensation under s. 56 for the continuous adoption of a special system of farming, the agreement should also provide for this.

(*f*) The compensation for the short-term new improvements specified in Part I of the Fourth Schedule to the Act, and for the matters falling within Part II of that Schedule, cannot conveniently be assessed until the tenant actually quits the holding. Under s. 51 the compensation therefore is to be the value of the improvements or matters to an incoming tenant calculated in accordance with such method, if any, as may be prescribed; though nothing in the Act is to prevent the substitution in the case of matters falling within Part II of the Fourth Schedule, for

4. The Landlord shall not be entitled to claim from the Tenant compensation for deterioration of the said holding or any part thereof in respect of any act matter or thing done or omitted by the Tenant prior to the date hereof but nothing herein contained shall be deemed to preclude the Landlord from claiming such compensation in respect of any act matter or thing done or omitted by the Tenant subsequent to the date hereof (*g*).

5. The Tenant shall not be entitled to sell or remove from the said holding any manure or compost or any hay or roots (*h*).

6. The Tenant shall be entitled within two months from the said —— day of —— next to remove the said fixtures and buildings specified in the said Second Schedule hereto and shall forthwith after such removal make good all damage occasioned thereby [*or* the Landlord shall purchase from the Tenant the said fixtures and buildings specified in the said Second Schedule hereto for the said sum of £——] (*d*).

AS WITNESS *etc.*

THE FIRST SCHEDULE *above referred to*

[*Particulars of improvements carried out by the Tenant upon the said holding*] (*c*).

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that measure of compensation of such measure of compensation, to be calculated according to such method, if any, as may be specified in a written contract of tenancy (subs. (2)); and where the parties have agreed in writing that any benefit is to be given or allowed to the tenant in consideration of his carrying out an improvement specified in Part I of the Fourth Schedule, the benefit is to be taken into account in assessing compensation (subs. (3)). The regulations at present in force under s. 51 are the Agriculture (Calculation of Value for Compensation), regs. 1948 (S.I. 1948, No. 185), as amended by the Amendment Regulations of 1950 (S.I. 1950, No. 2029). It is assumed in the above form that the parties have not agreed to vary the method of calculation.

(*g*) See ss. 57–59, which in certain circumstances entitle the landlord to compensation for deterioration of the holding.

(*h*) See s. 12, which provides that where a tenancy has been determined by notice the tenant may not, subject to any agreement in writing to the contrary, sell or remove from the holding any manure or compost, etc., grown in the last year of the tenancy unless before the sale or removal the landlord has consented thereto in writing.

(*c*), (*d*) See notes on p. 502.

[FIRST PART

Improvements begun before March 1 1948.

SECOND PART

Improvements begun on or after March 1 1948]

THE SECOND SCHEDULE *above referred to*

[*Particulars of fixtures and buildings erected by the Tenant on the said holding.*]

Form 2

Will of Married Man Settling Estate with Discretionary Power for Trustees to withdraw Capital for Benefit of Widow.

Drafted by John F. Turing, Solicitor

I A of *etc.* (*address and occupation*) HEREBY REVOKE all testamentary dispositions heretofore made by me AND DECLARE this to be my last Will.

1. I APPOINT B of (*address and occupation*) and my wife C

General Note

"Precedent" is probably too pretentious a term for this group of clauses, none of which is of the recondite type so much favoured by precedent books. The governing consideration has been *utility*.

Judging only from the writer's office experience, there is a more or less constant demand for this type of will amongst testators of moderate means. The testator's inclination is towards settling his estate for the benefit of his children and exonerating it from a second charge to estate duty on his widow's death, but he fears that with rising taxation and living costs his widow may not be able to keep within her income. This form is designed to meet this type of case: both the house and residue are settled, but the severity of the settlement is tempered by clause 9 which enables the trustees to withdraw and pay capital to the widow.

The house is settled upon trust for sale (*vide* clause 5) with the object of avoiding the requirements of the Settled Land Act, 1925, in relation to vesting deeds, etc. If desired, the house may be included with the residue but testators generally seem to prefer to see it in a separate clause; the method adopted also provides a convenient means of conferring certain additional powers on the trustees.

(hereinafter called "my Trustees") to be the Executors and Trustees of this my Will (*a*).

2. I BEQUEATH (*b*) the following specific legacies all free of duty (*c*):—

(a)

(b)

(c)

3. I BEQUEATH free of duty (*c*) all the residue of my personal chattels as defined by Form 2 of Part 1 of the Statutory Will Forms 1925 to my wife for her absolute use and benefit.

4. I BEQUEATH the following pecuniary legacies all free of duty:—

(a)

(b)

(c)

5. (1) I DEVISE my freehold house and property known as X at Y in the county of Z together with [*description of any outlying or detached land etc.*] (hereinafter called "my X property") to my Trustees UPON TRUST (but with the written

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(*a*) If the wife's name is put first, it will so appear in the probate and, after registration of probate, in the investment registers. Notices of company meetings, reports, etc., will then be sent to her as the first-named executor. It is assumed that the testator would prefer B (his "business" executor) to deal with these matters; his name has therefore been placed first.

(*b*) Some testators wish to make lengthy lists of specific legacies, often of trifling value. These for preference should not appear in the will but be relegated to a separate memorandum (not incorporated in the will).

(*c*) (1) "Free of Duty." See article, *Solicitors' Journal*, Vol. 93, p. 659, and the reasons there given for retaining the direction for freedom from duty, despite repeal of legacy duty. "Such directions were usually . . . intended primarily to provide for the liberation of the gift from legacy duty, but if no duty was specified, the effect, of course, extended to cover any liability to estate duty which might otherwise have burdened the gift. The disappearance of legacy duty has not made these words otiose. . . ."

(2) The legacies to be given by this clause should include an immediate pecuniary legacy to the widow to tide her over the early months of administration and to compensate her for loss of income due to the operation of the Apportionment Act, 1870. Alternatively the operation of the Act may be excluded.

consent of my wife during her life (*d*)) to sell the same with power to postpone sale for such a period as my Trustees shall think proper and to invest the net proceeds of sale in or upon any of the investments hereinafter authorised and to pay the income of the said investments and also the net rents and profits of my X property until sale to my wife during her life

(2) I DIRECT that so long as my X property shall remain unsold and during the lifetime of my wife my Trustees shall permit my wife if she so desires to reside in and occupy and enjoy the same she paying the rates taxes and outgoings for the time being payable in respect thereof and keeping the buildings adequately insured against fire (*e*)

(3) I DIRECT that from and after the death of my wife my X property or the proceeds of sale thereof or the investments representing the same shall fall into and form part of my residuary estate and shall be held by my Trustees upon the trusts hereinafter declared concerning the same

(4) IN extension of the statutory powers of my Trustees I empower them to lay out the proceeds of sale of my X property or any part thereof and of any property substituted under this present power in the purchase of any other freehold (or leasehold) property to be held upon trusts corresponding in all respects with the trusts hereinbefore expressly and by reference declared notwithstanding that at the time of such purchase my Trustees shall not hold any property upon trust for sale under the foregoing provisions (*f*).

(*d*) Although by this will the wife is herself appointed a trustee, she may disclaim the trust or retire from it; the requirement of her written consent will thus protect her from a premature sale even if she does not act in the trust. A stipulation for written consent of the life tenant does not prevent the trust for sale from being an "immediate binding" trust for sale (L.P.A., 1925, s. 205 (1) (xxix)) and thus does not invoke the provisions of the Settled Land Act relating to vesting deeds, etc.

(*e*) If it is desired to extend the insurance cover at the discretion of the trustees, substitute "against such risks insurable by a normal householder's comprehensive policy as my trustees shall from time to time require."

(*f*) This sub-clause is included to meet the unsatisfactory position resulting from the decisions in *Re Power's Will Trusts* [1945] Ch. 572,

(5) I DIRECT that all duties leviable at my death in respect of the foregoing devise or the property comprised therein shall be paid as part of my testamentary expenses out of my residuary personal estate (*g*).

6. I DEVISE and bequeath the residue of my real and personal estate to my Trustees upon the administration trusts declared in Form 8 of Part 2 of the Statutory Will Forms 1925 (which form shall be deemed to be incorporated in this my Will) (*h*) AND I DIRECT that my Trustees shall stand possessed of the said residue or so much thereof as shall not be required for giving effect to the said administration trusts (hereinafter called "the Trust Fund") upon the trusts hereinafter declared concerning the same.

7. MY Trustees shall pay the income of the Trust Fund to my wife during her life.

8. AFTER the death of my wife my Trustees shall hold the

Re Wakeman [1945] Ch. 177, and *Re Wellsted's Will Trusts* [1949] 1 All E.R. 577. In *Re Wakeman*, Uthwatt J. held that trustees who had sold all the land formerly held by them upon trust for sale ceased to be trustees for sale and so could not invest in the purchase of land. This question seems to have been left open by the Court of Appeal in *Re Wellsted*.

(*g*) That is, the estate duty which in the absence of contrary provision would have to be borne by the realty. The direction for freedom from duty is in this case only an administrative direction since the house is (in effect) held upon the same trusts as the residue. But where the trusts of the house and of the residuary estate are not identical the free of duty provision will assume importance.

In cases where the wife is the life tenant the words "leviable at my death" may be omitted because, as the law now stands no further estate duty would be payable on her death. In other cases they should be retained to make it plain that the only duties of which the property is relieved are those exigible on the testator's own death.

(*h*) In the opinion of the writer there is little to justify the continued reluctance of many conveyancers to adopt these forms. The advantages include (1) a shortened will, (2) freedom to concentrate upon the beneficial trusts which really matter, (3) a standard form in place of the multiple variations in the precedent books (further confused by the vagaries of clerks in the office!) and (4) relief (sometimes) from the burden of explaining to clients what is meant by the customary long clauses directing conversion, etc., and the rules in *Howe* v. *Dartmouth*, *Allhusen* v. *Whittell* and the rest. Testators generally seem to be content with the assurance that Form 8 of the statutory will forms is a proper form to be incorporated; for full measure a copy may be sent for perusal with the draft will.

Trust Fund as to both capital and income upon the following trusts (*i*):—

(1)

(2)

(3)

(4)

(5)

9. (1) NOTWITHSTANDING the settlement of the Trust Fund hereinbefore contained my Trustees may in their absolute discretion if they think fit and if so requested by my wife in writing withdraw out of such settlement [any part or parts not exceeding together (*state fraction*) of the Trust Fund] [any part or parts of the Trust Fund not exceeding in the whole the sum of £—— in value] and may pay or transfer the same to my wife free of duty and upon such payment or transfer being made such part or parts of the Trust Fund as aforesaid shall belong to my wife absolutely and shall be freed and discharged from all the trusts hereinbefore declared concerning the Trust Fund (*j*)

(2) For the purposes of the last preceding sub-clause the absolute discretion hereinbefore vested in my Trustees shall be exercisable by my Trustees for the time being other than and except my wife if and so long as my wife shall herself be one of my Trustees and if at any time she shall be the sole Trustee the said discretion shall not again become exercisable until the appointment of a new Trustee or new Trustees (*k*).

(*i*) These trusts vary in individual cases so much with the relationship and ages of members of the testator's family (and his own predilections) that they have no place in a "standard" form of will (see General Note).

(*j*) The testator should be advised against making this clause mandatory. If the trustees are obliged to act upon the request of his widow she will be deemed "competent to dispose" of the sum or share of the fund that she may withdraw, and this sum or share will attract estate duty on her death. Conversely, if the life tenant is not a surviving spouse the clause may be made mandatory because the life tenant's death will attract estate duty in any case. Any attempt to make the amounts to be withdrawn correspond with deficiencies of income may render the capital sums liable to income tax and surtax and should be avoided if possible. (See also vol. 14, p. 422, clause 8.)

(*k*) This sub-clause is included from abundance of caution and bolder spirits may prefer to omit it. There does, however, seem to be some risk

10. MY Trustees shall have the same uncontrolled and unfettered powers of investment of the Trust Fund and also of any other part or parts of my estate for the time being in their hands or under their control as they would have if they were the absolute beneficial owners thereof including power to purchase freehold or leasehold property (*l*) for occupation (*m*) but so that no investment shall be made unless previously approved by all my Trustees (*n*).

11. ANY Executor or Trustee of my Will being a solicitor accountant or stockbroker or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business transacted time expended and acts done by him or his firm in connection with the administration of my estate and the trusts of this my Will including acts which an executor or trustee not being in any profession or business could have done personally.

12. ANY person or persons having power to appoint new Trustees of this my Will may on any occasion when a power to appoint a new Trustee exists or arises appoint a trust corporation within the meaning of the Trustee Act 1925 (*o*) to be a Trustee of this my Will either as a sole Trustee or jointly with any continuing Trustees or Trustee and may agree the amount of the remuneration payable to the trust corporation so appointed and out of what funds and whether out of capital or income such remuneration or different parts thereof shall be paid.

IN WITNESS, *etc.*

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that a claim to duty might be founded upon the wife's power as a trustee to vote herself money from the trust, more particularly if at any time she becomes the sole trustee.

(*l*) As to purchase of leaseholds without qualification as to length of term, etc., the testator's instructions should be sought. But it is assumed that such a wide investment clause as this would not in any case be included except upon express instructions or with suitable explanation of its effect.

(*m*) An express power to purchase land permits of purchase for investment but not for occupation: *Re Power's Will Trusts* [1947] Ch. 572.

(*n*) Add "in writing" if desired.

(*o*) See s. 68 (18), *ibid.*

Form 3

Forms of Devise and Bequest to Hospitals

I

Bequest to a Voluntary Hospital Designated as a Teaching Hospital. Variations where the Legacy is to be Invested and the Income Only Used by the Hospital (*a*).

I GIVE to the Board of Governors of the —— Hospital constituted under the National Health Service Act 1946 or other the governing body thereof at my death the sum of £—— [free of duty] [to be applicable for the general purposes of such Hospital] [And it is my intention that the said sum shall be invested and the income only thereof applied in furtherance of the general purposes of the said Hospital].

AND I DECLARE that the receipt of the said Board of Governors or governing body or of any person professing to be authorised to act on its behalf shall be a sufficient discharge to my executors for the said sum [and they shall not be concerned to see to the application thereof].

II

Bequest to a Voluntary Hospital other than a Teaching Hospital.

I GIVE to the Hospital Management Committee constituted under the National Health Service Act 1946 for the —— Hospital or other the governing body of the said Hospital at my death the sum of £—— [free of duty] to be applicable for the

(*a*) The Board of Governors is a body corporate with perpetual succession; National Health Service Act, 1946, 3rd Sched., Part IV, 1. It has power under section 59 to accept, hold and administer any property upon trust for purposes relating to hospital services or its functions with respect to research. The legacy could, if desired, be appropriated to any one or more of such purposes. If the hospital is one of a group of hospitals together designated a teaching hospital under section 11 (8), the legacy should be given to the Board of Governors of the group on trust for the purposes of the particular hospital. As to gifts to medical and dental schools of a hospital or university, see sections 8 and 15 of the Act. Although legacy duty is abolished it appears desirable to make it clear that the legacy is to be free from any duty present or future.

general purposes of such Hospital [to the Management Committee constituted under the National Health Service Act 1946 for the —— Hospitals or if there shall be none at my death to the governing body of the said Hospital UPON TRUST to apply the same for the general purposes of the —— Hospital] (*b*)

AND I DECLARE that the receipt of the said Hospital Committee or governing body *etc.* (*as in last Form*).

III

Bequest to Voluntary Hospital Conditional on Naming a Bed in Memory of the Testator (*c*).

I GIVE to the Hospital Management Committee constituted under the National Health Service Act 1946 for the —— Hospital or other the governing body thereof at my death [free of duty] the sum of £—— [such a sum as the said Committee or governing body may be willing to accept at the date of my death on the terms of naming and maintaining in perpetuity a bed named after me] to be invested and the income applied in paying the general expenses of the said Hospital such legacy to be conditional and to be paid over only upon the said Committee or governing body giving an undertaking to name and maintain in perpetuity in the said Hospital in whatever building the same may be for the time being carried on a bed called the —— Bed.

AND I DECLARE that the receipt of the said Committee or

(*b*) The words in square brackets will be used where the Hospital Committee is constituted for a group of hospitals of which the hospital to be benefited is one.

(*c*) It is obviously impossible for the hospital to keep separate accounts in respect of any particular bed and a fund cannot be ear-marked to founding or maintaining such a bed. The best method of preserving the testator's memory is to give a legacy the income of which is to be applied to the general upkeep of the hospital conditionally on a bed being named in perpetuity. The committee or board can give an undertaking to do so. See *Re Ginger* [1951] 1 All E.R. 422. The amount may be the approximate cost of a bed, *viz.*, such a sum that the income equals the total expenditure of the hospital divided by the number of beds; but many hospitals have a scheme under which a smaller sum is accepted on these terms.

governing body or of any person professing to act on its behalf shall be a sufficient discharge to my executors for the said sum and that they shall not be concerned to see to the application thereof provided such undertaking be given.

PROVIDED that if the said Committee or governing body shall not accept the said sum on the terms above mentioned within one year after my death I give the said sum of £—— to ——.

IV

Gift to Voluntary Hospital for Founding a Research Laboratory (*d*).

I DEVISE ALL THAT piece or parcel of land situate at —— in the county of —— conveyed to me by a Conveyance dated the —— day of —— 19— and made between X of the one part and myself of the other part and the sum of £—— [free of duty] to the Hospital Management Committee constituted under the National Health Service Act 1946 for the —— Hospital or other the governing body thereof at my death UPON TRUST that

(*d*) The Board of Governors of a teaching hospital and a hospital management committee are corporations and have power to hold land without a licence in mortmain; National Health Service Act, 1946, 3rd Sched., Part IV, 1; the restrictions on assurances of land and personal estate to charitable uses in Part II of the Mortmain and Charitable Uses Act, 1888, and the Mortmain and Charitable Uses Act, 1891, do not apply to assurances to such a board or committee of land or personal estate to be laid out in land; and they can accept, hold and administer such property upon trust for purposes relating to hospital services; *ibid.*, section 59. The land will not therefore have to be sold within a year of the testator's death. The assent in favour of the board or committee must, however, under section 29 of the Settled Land Act, 1925, be sent to the Charity Commissioners within six months for recording. The conduct by the committee or board of research into matters relating to the causation, prevention, diagnosis or treatment of illness or mental defectiveness, is authorised by section 16 (2) of the Act: *cf. Re Whites' Will Trusts* [1951] 1 All E.R. 528, where the provision of a nurses' home of rest was held to be within section 60. This case, however, dealt with a trust coming into operation before the appointed day and the phrase "purposes of any hospital" in that section may have a wider meaning than "purposes relating to hospital services" in section 59.

A research laboratory is of course only suggested as a possible object and it would not generally be adopted unless the testator had knowledge of its being needed or without consultation with the hospital authorities. It might be more desirable to give a pecuniary legacy to be invested in the purchase of a site.

the said Committee or governing body shall erect on the said piece of land out of the said sum a research laboratory for conducting research into the causes diagnosis and treatment of —— and upon further trust that it shall invest the balance of the said sum of £—— in securities authorised by law for the investment of trust funds with power to vary such investments and out of the income thereof or (so far as the same shall not extend) out of the capital shall pay the costs of repairing maintaining and insuring the said laboratory and paying the costs of and incidental to the conduct therein of such research as aforesaid and also of assisting by grants or otherwise any person to conduct such research as aforesaid [whether at the said laboratory or not] Provided that the said Committee or governing body shall (subject to any consent required by law) sell any part of the said piece of land not required for the purposes of the said laboratory and apply the proceeds of sale and the rents and profits until sale for the general purposes of the said Hospital PROVIDED also that if at my death such laboratory shall not in the opinion of the said Committee or governing body be required or desirable in connection with the said Hospital (as to which a statement in writing signed by any person authorised to act on behalf of the said Committee or governing body shall be conclusive) [the said piece of land shall fall into and form part of my residuary real estate and the said sum of £—— shall sink into my residuary personal estate and not be payable]. [I DEVISE the said piece of land to the said Committee upon trust to sell the same and to apply the proceeds and the rents and profits until sale and the said sum of £—— for the general purposes of the said Hospital.]

AND I DECLARE that the receipt of the said Committee or governing body or any person professing to act on its behalf shall be a sufficient discharge to my executors for the said sum of £—— and that they shall not be concerned as to the application thereof or as to any dealings with the said piece of land after the same shall have been duly vested in the said Committee or governing body by assent or otherwise.

Form 4

Maintenance Deed Securing an Annuity to a Wife Living Apart from her Husband. Short Form without a Trustee (*a*).

THIS MAINTENANCE DEED made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Husband") of the one part and B of *etc.* (hereinafter called "the Wife") of the other part WITNESSETH as follows:— Parties.

1. The Husband shall during the joint lives of himself and the Wife [and so long as the Wife shall remain chaste] pay to the Wife the weekly sum of £X [such a weekly sum as after deducting income tax thereon at the standard rate for the time being in force shall amount to a net sum of £Y] such sum to commence from the date hereof and to accrue from day to day and be paid on ——day in each week the first payment to be made on ——day next. Covenant by husband to pay weekly sum.

2. (1) The Wife shall at all times hereafter pay and discharge her own debts and liabilities and shall keep indemnified the Husband therefrom and from all actions proceedings costs damages claims and demands in respect thereof Wife to pay her own debts and indemnify husband.

(2) If the Husband shall at any time hereafter be called upon to pay or discharge any such debt or liability then and in every such case the Husband may deduct and retain out of the weekly sum hereinbefore covenanted to be paid by him the amount of such debt or liability and any costs and damages incurred by him in relation thereto.

(*a*) A separation deed in the ordinary form prevents either party alleging that the separation was not by consent and constituted desertion, and pleading it as a ground of divorce under the Matrimonial Causes Act, 1950: *Pardy* v. *Pardy* [1939] P. 288. Consequently a separation deed may prejudice the parties' rights, and it may be preferable to have a deed in the above form which will not estop the parties from alleging desertion. Care must be taken to see that no other provisions are inserted which might amount to consent to the separation, *cf. Smith* v. *Smith* [1945] 2 All E.R. 452. The deed will not, like a separation deed, become void on resumption of cohabitation, nor does it appear to be safe to insert an express provision to this effect; the parties must make their own arrangements if this happens. If desired, trustees can be appointed by the parties so as to avoid the necessity of any direct communication between them. The stamp can apparently be reduced by providing for a weekly or monthly sum instead of a yearly or quarterly one

Custody of children.

3. (1) The Husband shall have the sole custody and control of —— and the Wife shall have the sole custody and control of —— and shall out of the said weekly sum maintain and educate her

(2) The other of the spouses shall have the right at all reasonable times to see and communicate with the said —— and —— respectively.

Covenant by wife to repay proportion of income tax reliefs.

[4. (1) The Wife hereby covenants with the Husband to repay to him such a portion of any income tax recoverable by her in each financial year by way of exemptions personal allowances abatements and reliefs (but not including those in respect of losses in any trade profession employment or vocation or attributable to particular items of income including earned income) as shall bear the same proportion to the entirety of the tax so recoverable by her as the gross amount of the aggregate of the weekly payments hereinbefore covenanted to be paid in such year bears to her total taxable income for that year And will sign all claims forms and other documents necessary for ascertaining and obtaining payment of any income tax recoverable by her

(2) For the purpose of this present clause income tax recoverable by the Wife shall be deemed to accrue from day to day during the financial year in respect whereof it is recoverable and be apportionable accordingly

(3) The covenant by the Wife for repayment herein contained shall take effect in substitution for any implied trust in favour of the Husband of the due proportion of any income tax recoverable by her and of her statutory rights in relation thereto.] (*b*)

IN WITNESS, *etc.*

(*b*) A similar right to repayment of the wife's reliefs would arise, if the words "at the standard rate for the time being in force" were omitted: *Re Pettit* [1922] 2 Ch. 765; but these words prevent any implication that the weekly sum is to be free of surtax, and in any case an express covenant is preferable.

As to losses in business, see *Re Lyons* [1951] 2 All E.R. 507.

Form 5

Agreement for Building Leases of Estate to be laid out in plots, the Form of Lease being set out in a Schedule. Variations where the Agreement is made by a Tenant for Life or Trustees for Sale (*a*).

Drafted by E. H. Bodkin, Barrister-at-Law

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression shall where the context so admits include the estate owner or estate owners for the time being of the reversion of the premises hereby agreed to be demised) of the one part and B of *etc.* Parties.

(*a*) The powers of a tenant for life to grant building leases and agreements are contained in the Settled Land Act, 1925, ss. 41–44. Under s. 28 of the Law of Property Act, 1925, trustees for sale have similar powers. The lease to be granted must be at the best rent obtainable having regard to the builder's covenant to build, and there are certain provisions as to apportionment of rent which may be important as to "residue leases." "Lease" is defined in s. 117 (x) of the Settled Land Act as including an agreement for a lease. A peppercorn rent can be reserved for the first five years of the term of the lease only, and, having regard to the above definition, it must be seen that neither under the lease nor the agreement (under which the tenant usually holds on the same terms as the lease until it is actually granted) or both together, can a peppercorn rent be payable for more than five years.

Further, under s. 42 (1) a lease must take effect in possession not later than 12 months after its date. The effect seems to be that all the leases must be granted, and the terms commence, not later than 12 months from the date of the building agreement. Though an agreement to grant a lease at a later date might be good against the lessor personally, it would not operate to bind his successors under s. 90. Each lease will therefore generally have to contain a covenant to erect or complete the house. If it be provided (as in cl. 24) that the agreement is to remain binding on the tenant notwithstanding the grant of the leases, the lessor will still have his remedy against the builder if the houses are not erected even if the lease is granted to a nominee. In the case of fiduciary owners, planning permission should be obtained prior to the agreement, as it would be impracticable to obtain permission and if necessary appeal against the conditions, much less to build, before the leases had to be granted, though it would no doubt be possible to insert a covenant in each lease to build when the builder had obtained planning permission. If permission is first obtained, building can commence as soon as the building licences are granted, or if these also have been obtained, at once. "Bye-law permission" (for which detailed plans are required) is usually now applied for at the same time as planning permission. Notice of intention to enter into the building agreement must be given by the tenant for life to the trustees of the settlement.

(hereinafter called "the Tenant" which expression shall where the context so admits include his executors administrators and assigns) of the other part.

Licence to tenant to enter and build.

1. The Landlord hereby grants licence to the Tenant to enter for the purpose only of building as herein stipulated upon the pieces or parcels of land (hereinafter called "the land") distinguished on the plan hereunto annexed as Lots —— and forming part of the —— Estate situate in the parish of —— in the County of —— as the same is distinguished on the said plan by the colour —— (which plan is intended only to show the position of the lots and roads and is not intended to be conclusive as to boundaries or dimensions).

Tenant to apply for planning permission

2. (1) The Tenant shall so soon as may be at his own cost apply for the necessary planning permission for the carrying out of the development hereby required to be carried out by him and shall pay or give proper security to the satisfaction of the Central Land Board for the payment of any development charge leviable in respect thereof and shall produce to the Landlord proper evidence of such planning permission and the Certificate of the Central Land Board of satisfaction of any development charge or that no development charge is payable in respect of such development or the Board's leave to proceed

PROVIDED that if the Landlord shall consider any conditions subject to which such permission is granted unreasonable or such as to involve undue expense he may either require the Tenant to withdraw the application or on being given a sufficient indemnity against the costs to appeal against such conditions (*b*)

and building licences.

(2) The Tenant shall also at his own cost from time to time before commencing to erect any houses on the land apply for all

(*b*) Under the Town and Country Planning Act, 1946, s. 24, the planning authority can on default by the tenant in complying with the conditions subject to which permission for development is granted, do the work themselves and recover the cost from the landlord. The builder may not have the money to do the work, particularly if he is prevented by restrictions on building from completing the contract, and his indemnity to the landlord under the agreement and s. 24 (2) of the Act may be valueless. It is therefore important to the landlord to be able to refuse development on unreasonable terms.

necessary building and other licences and consents of Government and Local Authorities

(3) If (i) planning permission satisfactory to the Landlord shall not be granted on application to the planning authority or on appeal prior to the —— day of —— 19— (*c*) and (ii) the requisite building and other licences and consents shall not then have been obtained this agreement shall on such date cease and become void without prejudice to any right of action or remedy of the Landlord in respect of any antecedent breach and the Tenant shall if required by the Landlord withdraw the application for planning permission And the Tenant shall have the right within a reasonable time to remove any materials brought by him on to the land for the purposes hereof. Provision for licences being refused.

3. Immediately after the date when planning permission satisfactory to the Landlord shall have been granted and the Certificate of the Central Land Board appropriate to the case mentioned in clause 2 (1) hereof or leave to proceed by the said Board shall have been produced to the Landlord and the other necessary building and other licences and consents obtained (hereinafter called "the date of commencement") The Tenant shall [fence round the land from the adjoining premises to prevent damage and trespass thereto and] shall proceed to erect cover in and complete fit for habitation upon the land in a good and substantial manner and with the best new materials in accordance with plans drawings elevations and specifications already prepared [to be prepared by and at the expense of the Tenant] and approved by the Landlord's surveyor and under the inspection and to the reasonable satisfaction in all respects of such surveyor —— houses with all proper and suitable outbuildings offices drains and fences on the sites and in the positions marked out and indicated on the said plan (*d*). Tenant to enter and build houses.

4. The said houses shall be erected and covered in within the following times namely —— houses within —— calendar Time for erection of houses.

(*c*) If the agreement is made by a tenant for life or trustees for sale this date must be not later than one year from the date of the agreement. See note (*a*), *ante*.

(*d*) As to the time for commencement of building in an agreement under the Settled Land Act, see note (*a*), *ante*.

months from the date of commencement [date hereof] —— houses within —— calendar months from the date of commencement [date hereof] and the remaining —— houses within —— calendar months from the date of commencement [date hereof] and every house shall be completely finished and ready for occupation within —— calendar months from the date for covering in (*e*).

Cost of houses.

5. The Tenant shall expend in the erection of each house the sum of £—— at least in labour and materials.

Tenant to make roads.

6. The Tenant shall also at his own sole expense within —— calendar months from the date of commencement [date hereof] construct and make the roads [and service roads] coloured —— on the said plan with proper pathways and sewers and junctions where required in accordance with plans and specifications [to be] approved by the Landlord's surveyor and shall maintain the said roads pathways and sewers until undertaken by the local authority.

Deposit with local authority.

7. The Landlord shall deposit with or secure the payment to the local authority of such sums as shall from time to time be required to cover the cost of making up the roads on which the said houses abut in accordance with the Private Street Works Act 1951 (*f*).

Houses to be private houses only.

8. The said houses shall be private dwelling-houses only [except that the Tenant shall be at liberty to erect one first-class hotel or tavern and the references to houses herein shall include such hotel].

Tenant to comply with planning control, etc.

9. The Tenant shall at his own expense comply in all respects with the statutes statutory instruments rules orders and regulations for the time being in force relating to planning control and any orders directions or notices made or given thereunder and in particular with the conditions imposed by any permission

(*e*) See note (*l*), *post*.

(*f*) Under the New Streets Act, 1951 (which applies to boroughs and urban districts other than metropolitan boroughs, but may be applied to rural districts by order), a sum must be deposited or secured before any work is done for the purpose of erecting the house to cover the estimated cost of making up the road on which such house abuts. If notice not to proceed is given before any work is done, or the local authority makes up the road itself, the deposit will be returned when the road is taken over. Similarly any excess over the actual cost will be repaid to the then owner (including the lessee if the lease has been granted).

for development granted in relation to the land and also with the building and other Acts and by-laws affecting the premises and the regulations of the Local Authorities and do all such works and things as are required thereby and shall pay and (without prejudice to any statutory indemnity) indemnify the Landlord against all fees charges penalties claims and expenses to be made and incurred thereunder.

Tenant not to create nuisance.

10. The Tenant shall not during the progress of the works or afterwards set up any steam engine or burn bricks or clay or cement or cause permit or suffer any nuisance on the land or any part thereof and no excavation shall be made (except for the purpose of digging foundations or making sewers) [and any gravel chalk or sand raised or dug up shall not be disposed of or removed by the Tenant but shall be deposited for the use of the Landlord as directed by the Landlord's surveyor].

Materials to belong to lessor.

11. All materials which may from time to time be brought by the Tenant on to the land for use in building the said houses shall be the absolute property of the Landlord with liberty for the Tenant to employ the same in building the said houses And if and so soon as this Agreement shall have been fully performed by the Tenant such of the said materials as shall not have been used for the purpose aforesaid shall revert to and become the property of the Tenant.

Tenant to insure.

12. The Tenant shall within one month after roofing in each house insure the same with the outbuildings thereof against loss or damage by fire [and aircraft] to the full value thereof in the —— Insurance Office or in some other insurance office to be approved in writing by the Landlord in the name of the Landlord and shall thereafter keep the same so insured and upon request produce to the Landlord or his agent the policy and the receipt for the last premium of every such insurance and in case of destruction or damage by fire [or aircraft] shall forthwith lay out the insurance moneys or in case of the deficiency thereof shall expend any further money required in rebuilding and reinstating the same according to the original plan and elevation thereof in a good and substantial manner under the direction of the Landlord's surveyor and in case the moneys received in

respect of the said insurance shall be insufficient for that purpose shall make up the deficiency out of his own moneys.

Lessor's power to inspect.

13. The Landlord or his agent may at all reasonable times enter upon the land and view the state and progress of the said buildings and works and the materials used and intended for use therein.

Agreement not to be assigned without leave.

14. The Tenant shall not assign sublet or part with the benefit of this Agreement without the previous consent in writing of the Landlord.

Grant of leases.

15. As and when each one of the said houses shall have been completely finished ready for habitation [built and covered in] in accordance with the stipulations hereinbefore contained and a certificate to that effect shall have been signed by the Landlord's surveyor [or one year from the date hereof whichever shall be the earlier] the Landlord shall by deed grant to the Tenant or a nominee of his to be approved by the Landlord a lease of such house with the ground belonging thereto and the appurtenances thereof including half the road on which such house abuts [exclusive of the road] For a term of —— years from the —— day of —— 19— At the yearly rent of £—— payable quarterly on the usual quarter days the first payment to be made on the —— day of —— 19— And in the meantime and until such rent shall commence the said lease shall be at the yearly rent of a peppercorn (*g*).

Form of lease.

16. Such lease shall be in the form and contain the conditions and provisions set forth in the Schedule hereto with such modifications (if any) as the death of parties or other circumstances may render necessary.

Counterpart to be executed.

17. The Tenant shall whenever required by the Landlord accept and execute a counterpart of the lease or leases hereby agreed to be granted upon the terms herein expressed and shall not call for the title of the Landlord.

Lease to be prepared by lessor's solicitor at tenant's cost.

18. The said lease and counterpart shall be prepared by the Landlord's solicitor at the cost of the Tenant.

(*g*) See note (*a*), *ante*. To prevent any question as to the agreement being liable to stamp duty as a lease for an indefinite period up to the time when the lease is granted, in addition to the term of the lease, it may be better to make the term of the lease run from the date of the agreement.

Tenant to be liable until lease granted.

19. Until the lease of any house shall have been granted the Tenant shall as from the date of this Agreement and so far as circumstances shall permit pay such rent and other moneys (which if in arrear shall be recoverable by the Landlord by distress as rent in arrear) and observe and perform such covenants and conditions as he would have to pay observe and perform if such lease had actually been granted.

Power of re-entry on default.

20. If the Tenant shall make default in erecting covering in and completing any of the said houses within the respective times and in manner aforesaid (in which respect time shall be of the essence of this Agreement) or shall in any respect fail to observe or perform this Agreement then and in any such case the Landlord shall have power to determine this Agreement and to re-enter upon and take possession of the portions of the land whereof leases shall not have been granted hereunder without making any compensation or allowance in respect thereof and without prejudice to the Landlord's right to retain any materials under clause 11 hereof or to any other accrued right of action or remedy of the Landlord in respect of rent or antecedent breach hereof by the Tenant.

Extension of time (*h*)

21. If the Tenant shall be prevented by any strike or lockout in the building trade or by shortage of or impossibility to obtain building materials from completing the said buildings at the times respectively hereinbefore specified such time or times shall be extended by such further period [as the Landlord's surveyor shall certify in writing to be reasonable] [as may be agreed such further period in default of agreement between the parties to be referred to the arbitration of two persons (one to be appointed by each party to the reference) or their umpire in accordance with the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force].

Determination of agreement on prohibition of building by Government (*i*)

22. If the Tenant shall at any time after the date of commencement be prevented for a continuous period of —— years by any Government prohibition restriction or limitation on building from proceeding with the erection of the said houses

(*h*) This and the following clause should not be inserted if the agreement is made by a tenant for life or trustees for sale.

(*i*) See note (*h*), *supra*.

or any of them in accordance with the terms and conditions and at the times hereinbefore specified then and in such event this Agreement shall on the expiration of such period of —— years cease and determine (except as regards the grant of any lease or leases which the Tenant shall have then become entitled to have granted to him or his nominee which lease or leases shall be granted by the Landlord on the terms and conditions hereinbefore specified) and without prejudice to any accrued right of action or remedy of the Landlord in respect of rent or antecedent breach of this Agreement by the Tenant And the Landlord shall pay to the Tenant such sum in respect of the value of the materials and labour expended by him on any houses or shops whereof he shall not at the date of determination be entitled to a lease hereunder as the Landlord's surveyor shall certify in writing to be fair and reasonable and the Tenant shall be entitled to remove and retain for his own use and benefit any materials brought by him on to the land which have not been actually used for the purposes hereof (*j*).

Tenant to pay costs of surveyor and of agreement.

23. The Tenant shall pay the proper costs of the Landlord's surveyor for approving the plans of and inspecting the execution of the works hereby required to be done by the Tenant and giving the certificates hereby provided for or otherwise in connection therewith and also the costs of and incidental to the preparation stamping and execution of this Agreement in duplicate.

Agreement to remain in force notwithstanding grant of leases.

[24. This Agreement shall remain in force as to any conditions or obligations not performed notwithstanding the grant of all or any of the leases required to be granted hereunder.]

Definition clause.

25. The expression "Landlord's surveyor" shall where the context so admits mean the surveyor for the time being employed by the Landlord in relation to the works hereby required to be done by the Tenant.

IN WITNESS, *etc.*

(*j*) The builder may not have obtained building licences for all the houses at the same time as the planning permission for development. It is, however, now usual to submit detailed plans of the buildings with the application for planning permission so as to obtain bye-law permission at the same time. Anyhow, building may become impossible or be prohibited after a licence has been granted.

The Schedule above referred to

FORM OF LEASE

THIS LEASE made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression shall where the context so admits include the estate owner or estate owners for the time being of the premises hereby demised immediately expectant on the term hereby granted) of the one [first] part [B of *etc.* of the second part] and C of *etc.* (hereinafter called "the Tenant" which expression shall where the context so admits include his executors administrators and assigns) of the other [third] part

WITNESSETH that in consideration of [the expense incurred by the said B in erecting the messuage hereby demised and of the sum of £—— now paid to the said B by the Tenant (the receipt and payment whereof the said B hereby acknowledges) and] of the rent and covenants on the part of the Tenant and conditions hereinafter reserved and contained the Landlord [by the direction of the said B] hereby demises unto the Tenant (*k*) Demise.

ALL THAT piece or parcel of land situate on the —— side of a new road or street called or intended to be called —— Road in the Parish of —— in the County of —— and ALL THAT messuage or dwelling-house and outbuildings erected or now in course of erection on the said piece or parcel of land and called or intended to be called No. — —— Road which premises are shown on the plan hereto annexed TOGETHER with one moiety of —— Road aforesaid so far as the same is co-extensive with the said piece or parcel of land [but not including any part of —— Road aforesaid] [AND TOGETHER with the right in common with the other persons having the like right to the use of —— Road aforesaid and all other streets and roads formed made and opened to communicate through in or upon any part of the —— Estate Parcels.

(*k*) The variations in square brackets in the lease preceding the parcels are to be used if the lease is granted to the builder's nominee. If it is intended to create a building scheme, the agreement should contain a recital of the laying out of the estate as a building estate subject to the stipulations in the scheduled lease, which should contain covenants by the landlord and tenant to observe the stipulations set out in the schedule thereto.

as and when the same shall be opened for use] EXCEPT AND RESERVING unto the Landlord the free and uninterrupted passage and running of water and soil from and to the other buildings and land of the landlord and his tenants adjoining or near to the demised premises through the sewers drains and watercourses which are now or may hereafter during the term hereby granted be in or under the same premises.

Habendum. To HOLD the same unto the Tenant for the term of 99 years from the —— day of —— 19—.

Reddendum. YIELDING AND PAYING therefor during the said term the yearly rent of £—— in respect of the demised premises without any deduction except for Landlord's property tax by equal quarterly payments on the usual quarter days the first payment to be made on the —— day of —— next.

Tenant's covenants: And the Tenant hereby covenants with the Landlord in manner following that is to say—

to pay rent; (1) To pay the rent hereby reserved at the times and in manner hereinbefore provided without any deduction except as aforesaid

to pay rates and taxes; (2) To pay and discharge all present and future rates taxes duties assessments impositions outgoings and charges whatsoever whether parliamentary parochial local or of any other description which now are or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises or the owner or occupier thereof landlord's property tax only excepted

to contribute to cost of roads, etc.; (3) To contribute a due proportion of the expenses of making repairing rebuilding maintaining and cleansing all party walls and structures drains pipes sewers roads pavements fences watercourses and other conveniences which shall during the term belong to or be used in common by the demised premises and any adjoining or neighbouring premises including the cost of making up and kerbing the road on which the demised premises abut so as to be taken over by the local authority (such proportion in default of agreement to be settled by the Landlord's surveyor for the time being whose decision shall be final and to be paid on demand) and to reimburse the Landlord upon the

taking over of the said road for the sum deposited by him with or secured to the local authority under the Private Street Works Act 1951 in respect of the demised premises or so much thereof as shall not be repaid to the Landlord with interest thereon at the rate of £3 per cent. per annum until payment

(4) To execute all such works as are or may be under or in pursuance of any statute or otherwise required by the Government or a Local or Public Authority to be executed upon or in respect of the demised premises whether by the Landlord or Tenant thereof — to do works required by authorities;

(5) Under the inspection and to the satisfaction of the surveyor of the Landlord for the time being and in accordance with the plans drawings elevations and specifications already [to be] approved by him complete and finish the messuage buildings and erections hereby demised with offices and outbuildings and all necessary and suitable fences ways drains and other works in connection therewith and to complete the said messuage fit for habitation and use before the —— day of —— 19— unless prevented by fire stress of weather strike or combination of workmen [or shortage or impossibility to obtain building materials] (*l*) — to finish house;

(6) At all times during the said term to keep the said messuage and all additions thereto and the fixtures therein in good and tenantable repair [damage by fire Act of God and inevitable accident excepted] — to keep in repair;

(7) Once in every seven years of the said term and in the last year thereof to paint with two coats of good and proper oil paint paper with suitable quality paper grain varnish whitewash and colour all the inside parts of the demised premises usually painted grained varnished whitewashed and coloured and which the Tenant is hereby required to keep in repair — to paint inside;

(*l*) There is no necessity in order to comply with the Settled Land Act powers of leasing (provided the lease takes effect in possession within a year) for the tenant to covenant that the building shall be completed in a specified time. But in a lease by mortgagor or mortgagee under their statutory powers, the tenant must covenant to erect the house within five years from the date of the grant: *Re Grosvenor S.E.* [1933] Ch. 97. If the house is not begun, it will be necessary to specify the type and cost of house to be erected.

to paint outside;

(8) Once in every three years of the said term and in the last year thereof to paint the outside wood and iron and stucco or cement work of the said messuage and all additions thereto with two coats of good and proper oil paint in a proper and workmanlike manner

to yield up in repair;

(9) At the expiration of the said term quietly to yield up the demised premises and all additions and improvements thereto and all fixtures of every kind in or upon the demised premises or which during the said term may be affixed or fastened to or upon the same in the same good and tenantable repair [but subject to the same proviso] in which the Tenant is hereinbefore required to keep the same

to allow landlord to enter and view;

(10) To permit the Landlord and all persons authorised by him to enter upon the demised premises or any part thereof at all reasonable times to inspect the condition thereof and of all defects decays or wants of reparation found upon such inspection which the Tenant shall be liable to make good under the covenants hereinbefore contained to give or leave notice on the demised premises And within the space of two calendar months after such notice to repair and amend the same according to such notice and covenants

to permit landlord to repair in default;

(11) That if the Tenant shall make default in complying with any such notice as aforesaid or in the performance of any of the covenants for or relating to repair or decoration hereinbefore contained it shall be lawful for the Landlord (but without prejudice to the right of re-entry hereinafter contained) to enter upon the demised premises and execute the requisite repairs decorations and work at the expense of the Tenant in accordance with the covenants and provisions herein contained and the Tenant shall on demand repay to the Landlord the expenses of such repairs decorations and work

not to alter or carry out development without permission;

(12) Not without the written consent of the Landlord first obtained at any time during the said term to erect or suffer to be erected any new buildings (except as aforesaid) on the demised premises or to make or suffer to be made any alterations or additions to the messuage and buildings which he is hereby required to complete either internally or externally or to cut

or maim any of the inside or outside walls roof floors or joists thereof or to carry out or suffer to be carried out any development within the meaning of the Town and Country Planning Act 1947 or any statutory modification or re-enactment thereof for the time being in force in or upon the demised premises

to apply for planning permission;

(13) Before carrying out any development for which the permission of the local planning authority shall be requisite at the Tenant's own cost to apply for such permission and to pay or give proper security for the payment of any development charge leviable in respect thereof and not to commence carrying out such development until he shall have obtained and produced to the Landlord or his agent such permission and also the Certificate of the Central Land Board that any development charge in respect thereof has been paid or secured to their satisfaction or that no development charge is payable or the Board's consent to proceed

to comply with planning law;

(14) Not to do or omit or suffer to be done or omitted any matter in contravention of the statutes statutory instruments rules orders or regulations for the time being in force relating to planning control or affecting user of the demised premises or any orders directions or notices made or given thereunder respectively and in particular to comply with the conditions attached to any permission for development granted or to be granted in relation to the demised premises and also at all times (without prejudice to any statutory indemnity in that behalf) to indemnify and keep indemnified the Landlord against all proceedings costs expenses claims and demands in respect thereof

to pass on notices to landlord;

(15) Forthwith to deliver to the Landlord a copy of any notice served upon him or any sub-tenant and of any order or proposed order affecting the demised premises and to take all reasonable steps to comply with such notice and also at the request and cost of the Landlord to make or join with the Landlord in making such objections representations or appeals in respect thereof as the Landlord may reasonably require.

not to commit nuisance;

(16) Not to do or suffer to be done on the demised premises any act or thing which in the opinion of the Landlord may be

or grow to be a nuisance annoyance or damage to the owners or occupiers of adjoining or neighbouring premises

to use as private dwelling-house;

(17) To use and occupy the said messuage as a private dwelling-house only and for no other purpose

to insure;

(18) To insure and keep insured against loss or damage by fire [and aircraft] the said messuage and all additions and fixtures of an insurable nature which at any time during the said term may be erected on or affixed to the demised premises to the full value thereof (such value to be determined by the surveyor for the time being of the Landlord) in the —— Insurance Office or in some other insurance office of repute to be approved in writing from time to time by the Landlord in the name of the Landlord and duly and punctually pay all premiums or other money necessary for effecting and keeping up such insurance immediately on the same becoming due or within one week thereafter and to produce to the Landlord or his agent whenever required the policy of such insurance and the receipt for the last premium thereof And in case the said messuage and premises or any part thereof shall at any time during the said term be destroyed or damaged by fire [or aircraft] then and as often as the same shall happen to lay out with all convenient speed all moneys received in respect of such insurance in rebuilding repairing or otherwise reinstating the same in a good and substantial manner according to the original plan and elevation under the direction of the Landlord's surveyor for the time being [and to pay the fees of such surveyor] and in case the moneys received in respect of the said insurance shall be insufficient for that purpose to make good the deficiency out of his own moneys

to preserve easements;

(19) To use his best endeavours to prevent any easement or right belonging to or used with the demised premises from being obstructed or lost

not to allow encroachments;

(20) Not to allow any encroachment to be made or easement acquired on or over the demised premises

to permit landlord to enter to repair adjoining premises;

(21) To permit the Landlord and any persons authorised by him in writing at any time or times during the said term during seasonable hours in the day-time and on reasonable notice to

enter on the demised premises for executing necessary repairs alterations and amendments of or upon the adjoining messuages

(22) To permit the Landlord or his surveyor during the last seven years of the said term to enter the demised premises during seasonable hours in the day-time and on reasonable notice for the purpose of taking schedules or inventories of the fixtures and things to be yielded up at the expiration of the said term

to permit landlord to take schedule of fixtures;

(23) To pay to the Landlord all costs charges and expenses (including legal costs and surveyor's fees) which may be incurred by the Landlord of and incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or any statutory modification or re-enactment thereof for the time being in force notwithstanding that forfeiture is avoided otherwise than by relief granted by the court

to pay costs of relief from forfeiture;

(24) Within three calendar months next after any absolute transfer assignment or devolution of his interest under this present lease in the demised premises or any part thereof to give notice in writing of such transfer assignment or devolution and of the name quality and place or places of abode of the transferee or transferees to the Landlord or his solicitor and produce to him the instrument of such transfer assignment or devolution and pay to him a fee of £—— for the registration of such notice

to register assignments;

(25) Not at any time during the last seven years of the said term to assign underlet or part with or share the possession of the demised premises or any part thereof without the consent in writing of the Landlord such consent not to be unreasonably refused.

not to assign without consent during last seven years.

AND THE Landlord hereby covenants with the Tenant:—

That the Tenant paying the rent hereby reserved and observing and performing the covenants and conditions herein contained and on his part to be observed and performed may peaceably and quietly enjoy the demised premises without any interruption or disturbance by the Landlord or any person claiming under [or in trust for] him (*m*).

(*m*) The words in square brackets should be omitted where the landlord is a tenant for life.

Proviso for re-entry.

PROVIDED ALWAYS and this Lease is upon the express condition that if the rent reserved or any part thereof shall at any time be in arrear and unpaid for fourteen days or upwards (whether the same shall have been legally demanded or not) or if the Tenant shall at any time fail or neglect to observe or perform any of the covenants conditions and agreements herein contained and on the part of the Tenant to be performed and observed then and in that event the Landlord may re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the term hereby granted shall cease and determine without prejudice to the rights and remedies of the Landlord in respect of any antecedent breach of the covenants conditions and agreements on the part of the Tenant herein contained.

[*Certificate as to value if applicable.*]

IN WITNESS, *etc.*

Form 6

Agency Agreement between a Statutory Water Corporation and a Rural District Council for Collection of Water Rates from Tenants of the Council (*a*).

Drafted by J. J. Somerville, of Gray's Inn

AN AGREEMENT made the —— day of —— 19— BETWEEN —— Company a statutory Water Undertaking incorporated by —— Waterworks Act 18— the office of which is situate in —— in the County of —— (hereinafter called "the Company") of the one part and —— Rural District Council (hereinafter called "the Council") of the other part. Parties.

WHEREAS:—

(a) The Council is the Local Housing Authority for its area

(b) The Company is the Statutory Water Undertaker for and within the area of the Council Recitals: of status of parties;

(c) The Company has agreed to appoint the Council as its agent for the collection of Water Rates from the tenants of the Council within the Company's area of supply as prescribed by the said —— Waterworks Act, 18— (hereinafter called "the Act") and for other moneys due to the Company from such tenants upon the terms and subject to the provisions herein contained. of agreement.

NOW THIS DEED WITNESSETH and IT IS HEREBY AGREED AND DECLARED between and by the parties hereto as follows:—

1. THE Company hereby appoints the Council and the Council for the consideration hereinafter mentioned hereby agrees to act for a term of [at least] —— years from the —— day of —— 195— as the Company's Agent to collect, get in and receive of and from each and every tenant or tenants of the Council as Local Housing Authority within the Council's statutory area All water rates (and all other moneys) which may at any time or times henceforth during the continuance of this Agreement become due and payable to the Company for water (goods or services) supplied to or for or on behalf of each of such Appointment of council as agent.

(*a*) Stamp 10s. Under seal. Execute in duplicate. This agreement does not entitle the council to *demand* water rates.

tenants and all costs charges and interest in respect of such water (goods and services) owing from each and every such tenant or tenants of the Council to the Company

Provided that the foregoing appointment shall not authorise or be deemed to authorise the Council to sue for or commence proceedings for the recovery of Water Rates from any tenant of the Council (or for moneys due to the Company for goods or services supplied to any tenant of the Council) save with the consent in writing and in the name of the Company.

Remuneration of council.

2. (1) In consideration of the Council acting as such Agent for collection on behalf of the Company and of the covenants of the Council hereinafter contained, the Company hereby agrees with the Council that, out of the moneys which shall henceforth be due from each and every of such tenants of the Council to the Company and which shall be collected got in and received by the Council as such Agent and not otherwise the Council may retain for its own use £2 10s. in every £100 and at the same rate for every part of £100 so collected got in and received by the Council as aforesaid which moneys so authorised to be retained are hereinafter called "Commission"

Covenants by council.

(2) For the consideration aforesaid the Council hereby covenants with the Company as follows, namely:—

(a) That the Council will diligently and faithfully collect get in and receive and will pay to the Company all moneys so agreed to be collected got in and received by the Council less Commission for or on behalf of the Company on the —— day of —— the —— day of —— the —— day of—— and the —— day of —— in every year the first payment being made by the Council on the —— day of —— 19— in respect of moneys due to the Company from each and every tenant of the Council during the Company's supply quarter ended the —— day of —— 19—

(b) That the Council will effectually indemnify the Company against all losses which may be incurred by the Council in the collection getting in and receipt of moneys due to the Company and in particular by failure of such

tenants of the Council to pay to the Council moneys due to the Company and

(c) That the Council will upon receipt of all moneys due to the Company from each and every of the Council's tenants give a receipt in discharge for such payment or payments and shall account and make a record of such payment or payments to and for the Company and if so accounted for and recorded and if such receipt is in a form agreed by the parties hereto such receipt in discharge shall bind the Company.

3. IT IS HEREBY AGREED AND DECLARED as follows:—

Miscellaneous provisions.

(1) Nothing herein shall derogate in any manner from the powers remedies and rights conferred on the Company by the Act or shall be deemed to be a delegation of such powers remedies and rights to the Council save liberty to the Council to collect moneys due to the Company from each and every of the tenants of the Council PROVIDED that the Company shall not refuse to exercise its powers remedies and rights for the recovery of moneys due to the Company from each and every such tenant of the Council if the Council in writing request the Company to exercise such powers remedies and rights

(2) The Company shall punctually supply the Council in writing with all necessary information as to all moneys due to the Company from each and every tenant of the Council and the Company shall be responsible for the accuracy of such information and no loss shall accrue to the Council which arises directly or indirectly from inaccurate information supplied by the Company to the Council

(3) The Company by its agents officers or servants notwithstanding the provisions hereof shall be entitled at all times to exercise all of its statutory powers remedies and rights PROVIDED that if the Company at any time during the continuance of this Agreement exercises all or any of its powers remedies and rights in respect of money due to the Company from each and every of the Council's tenants Commission shall nevertheless accrue to and be payable by the Company to the Council

Provision for termination.

(4) The Council shall not save with the consent of the Company in writing employ any person to collect moneys due to the Company save agents or officers of the Council and no such agent or officer shall be in the or shall have been in the former employment of the Company.

4. THIS Agreement may be determined by either party hereto after the expiration of the —— day of —— 19— by either party hereto giving to the other —— months' notice in writing to determine the provision of this Agreement on any future —— day of —— and thereupon all moneys due to the Company from the Council shall be paid to the Company on or before the —— day of —— next succeeding the said —— day of —— in the year which such —— months' notice shall expire.

Arbitration.

5. ALL questions or differences whatsoever which may at any time hereafter arise between the parties hereto touching this agreement or the subject-matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to a single arbitrator in case the parties can agree upon one, otherwise to two arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Arbitration Act 1950.

IN WITNESS, *etc.*

Form 7

Assignment of Leasehold Shop Premises on Sale together with the Goodwill of the Business, the Purchase Price being Payable by Instalments and a Surety Joining. Covenant by the Vendors not to Carry on a Competing Business (*a*).

Drafted by Alfred Powell, Solicitor

Parties.

THIS DEED OF ASSIGNMENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Vendors") of the first part C Ltd. whose registered office is

(*a*) Stamp *ad valorem.*

situate at *etc.* (hereinafter called "the Company") of the second part and D of *etc.* and E of *etc.* (hereinafter called "the Sureties") of the third part.

WHEREAS:—

(1) By a Lease under seal dated the —— day of —— and made between F Ltd. of the one part and G of the other part ALL THAT ground floor lock-up shop with kitchen therein described known as No. — High Road —— in the county of —— as the same were for the purposes of identification only delineated in the plan drawn on reciting presents and thereon edged with red And Also all fixtures and fittings on the said premises of the nature of Landlord's fixtures Except and Reserved to the Lessor as in the said Lease mentioned were demised unto the said G and his successors in title from the —— day of —— for the term of — years at the yearly rent of £— subject to the Lessees covenants and conditions therein contained Recitals: lease;

(2) By virtue of certain assurances and acts in the law and events and ultimately by an Assignment dated the —— day of —— and made between H of the one part and the Vendors of the other part the premises comprised in and demised by the said Lease became and are now vested in the Vendors as joint tenants for the residue of the said term of years subject to the said rent covenants and conditions Upon trust for sale and to stand possessed of the net proceeds of sale in trust for themselves in equal shares as tenants in common mesne assignments;

(3) The Vendors have since the date of the last mentioned deed carried on the business of a —— on the said premises vendors' business;

(4) The Vendors have agreed with the Company for the sale to them of the said business and the said leasehold hereditaments and the stock in trade chattels and fittings in or about the premises at the aggregate price of £X agreement for sale;

(5) The said stock in trade chattels and fittings have been delivered to the Company. delivery of chattels;

(6) For the purpose of stamp duty it is agreed that the said stock in trade chattels and fittings capable of manual delivery should be taken at the value of £Y

payment of purchase-money;

(7) It has been agreed that the balance of the said purchase-money of £X–Y shall be paid as to £Z part thereof on the execution of these presents and as to the balance thereof by the instalments hereinafter provided

agreement of sureties to join.

(8) The Sureties have at the request of the Company agreed to join in these presents for the purpose of entering into the covenants and agreements on their part herein contained as Sureties for the Company.

Witnesseth.

NOW THIS DEED WITNESSETH as follows:—

Assignment of leasehold premises and business.

1. That in pursuance of the said agreement and in consideration of £X–Y to be paid by the Company as aforesaid (the receipt of £Z of which the Vendors hereby acknowledge) and in consideration of the covenants by the Company and the Sureties hereinafter contained the Vendors as beneficial owners hereby assign unto the Company FIRST all the hereditaments and premises comprised in and demised by the hereinbefore recited Lease and SECONDLY all that the business of —— so carried on by them at No.— High Road —— aforesaid and the goodwill thereof To HOLD the same unto the Company and its successors in title as to the premises comprised in the said Lease for the residue of the said term of years subject to the rent covenants and conditions by and in the said Lease reserved and contained and as to all other the premises hereby assigned absolutely.

Covenant by vendors not to carry on competing business.

2. The Vendors do and each of them doth hereby covenant with the Company that the Vendors or either of them will not within one year from the date hereof either solely or jointly with or as manager or agent for any person or corporation directly or indirectly carry on or be engaged or interested in the business of a —— nor permit his or their names to be used in connection with any such business within one mile of —— High Road —— aforesaid.

Covenant to pay balance of purchase-money by instalments.

3. The Company hereby covenants with the Vendors to pay to them the balance of the said purchase-money with interest thereon in the meantime at the rate of 4 per cent. per annum by the instalments at the time and in the manner following that is to say:—by half-yearly instalments of £—— on the —— day of —— the —— day of —— and the —— day of ——

the —— day of —— and the —— day of —— and the —— day of —— and a final instalment of £— on the —— day of ——.

PROVIDED ALWAYS that if any instalment of principal or interest or any part thereof shall remain unpaid after —— days from the day so appointed for the payment thereof then and in such case the whole of the said purchase-money or of the unpaid part thereof with the interest thereon shall become immediately due and payable and the Vendors may enforce payment thereof forthwith AND IT IS HEREBY AGREED AND DECLARED that until the whole of the purchase-money and the interest thereon has been paid the Vendors shall retain the Lease this Assignment and the other muniments of title relating to the said premises.

Covenant by sureties.

4. The Sureties hereby jointly and severally covenant with the Vendors that in case default shall be made in payment of any of the instalments of purchase-money or interest thereon or on any part thereof they the Sureties will on demand pay to the Vendors the same moneys and interest or so much thereof as shall remain unpaid PROVIDED ALWAYS and it is hereby agreed as between the Sureties and the Vendors that the Sureties shall be considered as principal debtors to the extent that the Sureties shall not be released from their obligations by time being given to the Company or by any other variation in the provisions of this Assignment or any other thing whatsoever whereby the Sureties as Sureties would have been so released.

5. The covenants implied under section 77 (1) (c) of the Law of Property Act 1925 shall be deemed to be incorporated in these presents.

Certificate as to value.

[AND it is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £——.]

IN WITNESS *etc.*

Form 8

Conveyance and Declaration of Trust of Site for the erection of a Village Hall, the purchase money and cost of erection being raised by Voluntary Subscription (*a*).

Drafted by E. H. Bodkin, of Lincoln's Inn

1. CONVEYANCE TO TRUSTEES

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the one part and B of *etc.* C of *etc.* and D of *etc.* (hereinafter called "the Purchasers") of the other part.

WHEREAS:—

Recital of agreement for sale.

(1) The Vendor is seised in unincumbered fee simple in possession of the property hereinafter described and has agreed to sell the same to the Purchasers at the price of £X and it has been agreed that the same shall be conveyed to them in manner hereinafter appearing

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(*a*) As the Declaration of Trust gives power to the trustees to sell and apply the proceeds as income, the consent of the Charity Commissioners to the sale or mortgage of the site will not be required. See *Re Stockport Ragged Industrial & Reformatory Schools* [1898] 2 Ch. 687; *Re Society for Training Teachers of the Deaf & Whittle's Contract* [1907] 2 Ch. 486. See, however, the criticism of the latter cases in Withers on Mixed Charities at pp. 6 and 17. Consequently there is no point in disclosing that the land is held on charitable trusts in the Conveyance under s. 29 (1) of the Settled Land Act, 1925, and this section does not in terms require this to be done in a Conveyance to a charity, as it does where the trustees of the charity are themselves conveying.

If the land has already been conveyed to the trustees without disclosing any trusts (as may validly be done), and the money subscribed is in their hands, they can declare the trusts on which they are to be held without the concurrence of the subscribers: *Att.-Gen.* v. *Mathieson* [1907] 2 Ch. 383. The Declaration of Trust must be enrolled with the Charity Commissioners —Settled Land Act, 1925, s. 29 (4).

The most convenient method of carrying out the transaction will depend on the circumstances. If no site is immediately available, it may be preferable to execute the Declaration of Trust first, giving power to acquire land to be conveyed on trust for sale. Or possibly the subscribers may prefer the building to be carried out under their directions before any deed is executed. The hall may if desired be handed over to the Parish Council.

NOW THIS DEED WITNESSETH as follows—

1. In consideration of the sum of £X on or before the execution hereof paid by the Purchasers to the Vendor (the receipt and payment whereof the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby conveys unto the the Purchasers Conveyance.

ALL THAT *etc.*

TO HOLD unto the Purchasers in fee simple.

2. The Purchasers shall stand possessed of the property hereby assured UPON TRUST to sell the same or any part thereof with power to postpone such sale and shall hold the net proceeds of any such sale after payment of costs and of the rents and profits of such part of the same property as shall for the time being remain unsold Upon the Trusts and with and subject to the powers and provisions declared and contained concerning the same by a Declaration of Trust already prepared and intended to bear even date herewith and to be made by the Purchasers. Trust for sale.

3. Until 21 years from the death of the survivor of the Trustees the trustees hereof shall have power to raise money by mortgage for any purpose. Power to appoint trustees.

4. The statutory power of appointing new trustees shall apply to this Conveyance.

[5. Declaration as to value.]

[6. Acknowledgment for production of Documents.]

IN WITNESS *etc.*

2. DECLARATION OF TRUST

THIS DECLARATION OF TRUST is made the —— day of —— 19— BY B of *etc.* C of *etc.* and D of *etc.* (hereinafter called "the Trustees") Parties.

WHEREAS:— Recitals:

(1) By a Conveyance (hereinafter called "the Conveyance") bearing even date with but executed before this deed and made conveyance to trustees;

between A of the one part and the Trustees of the other part a piece of land situate at —— in the county of —— therein more particularly described was in consideration of £X expressed to have been paid by the Trustees conveyed to the Trustees in fee simple Upon Trust to sell the same or any part thereof with power to postpone such sale and to stand possessed of the proceeds of any such sale after payment of costs and of the rents and profits of such part of the same piece of land as should for the time being remain unsold Upon the Trusts and with and subject to the powers and provisions declared and contained concerning the same by a Declaration of Trust of even date therein referred to being this deed

purchase money raised by subscription;

(2) The said purchase-money of £X was in fact part of a sum of £Y raised by voluntary subscription of the inhabitants of —— for the purchase of a site for the erection of a village hall for —— and for providing for the cost of the erection thereof

nomination of trustees;

(3) The balance of the said sum of £Y amounting to the sum of £Z has been paid to and is now held by the Trustees who have been nominated for the purpose of acting in the trusts of the said village hall by the said subscribers

approval of meeting.

(4) At a meeting of the said subscribers held on the —— day of —— 19— it was resolved that a draft of this deed and of the Conveyance be approved and executed by the Trustees for the purpose of acquiring and declaring the trusts relating to the said piece of land and the said sum of £Z.

Now this Deed Witnesseth as follows—

Declaration of trust of proceeds of sale and subscriptions.

1. The Trustees hereby declare that they and the survivors or survivor of them for the time being or other the trustees or trustee hereof will stand possessed of the net monies to arise under any sale made under the recited trust for sale in the Conveyance of the property thereby assured and the buildings to be erected thereon or any part thereof and any other capital monies and of all subscriptions donations bequests or other monies received by them and not appropriated by the donor to any particular purpose and any investments representing the same or the balance of the said sum of £Z Upon Trust to apply the same for or towards the general purposes of the said village hall.

2. The Trustees will hold the said sum of £Z UPON TRUST to apply the same or so much as shall be required for that purpose in erecting upon the said piece of land comprised in the Conveyance or on part thereof a suitable building with fittings furniture and appurtenances for use as a village hall for the benefit of the inhabitants of ——. Balance to be used for building.

3. The Trustees may invest the balance (if any) of the said sum of £Z and any other monies received by them in any investments authorised by law for the investment of trust monies with power to vary such investments for others of a nature hereby authorised. Power to invest.

4. The Trustees shall apply the rents and profits of the unsold portion for the time being of the said piece of land and the income of any such investments as aforesaid and any such subscriptions donations bequests and other monies received by them as aforesaid and not invested in the payment of rates taxes insurance of buildings and effects and maintenance thereof and other outgoings expenses of repairs (whether structural or current) and costs of management (including expenses incurred under the Conveyance) and generally in such manner for the general purposes of the said village hall as they think fit with power for any of such purposes to resort to capital and shall have power to apply capital or income for altering improving pulling down or rebuilding any buildings. Application of rents and income.

5. The Trustees will until sale of the said village hall permit the same to be used as a village hall for the benefit of the inhabitants of —— and may appropriate adapt and furnish any part thereof as a library or reading room or for other purposes for the benefit of such inhabitants. Building to be used as hall.

6. The Trustees may permit any person or persons (being inhabitants of ——) to use the said village hall for the purpose of lectures meetings or concerts and may make such charge therefor (if any) as they shall think fit. Holding of meetings, etc.

7. The Trustees may receive grants donations and subscriptions for or towards any of the purposes hereby authorised. Power to receive donations.

8. The Trustees may raise by mortgage or charge any monies required for any of the purposes hereof. Power to mortgage.

Appointment of officers and servants.

9. The Trustees may appoint such officers and servants and at required for any of the purposes hereof and the provisions of section 17 of the Trustee Act 1925 shall apply for the protection such remuneration as they think fit and in particular may appoint a secretary and delegate to him or her any powers relating to the conduct management or letting of the hall and may also make such rules and regulations from time to time for the management and conduct thereof as they think fit (*b*).

Accounts.

10. Proper books of account shall be kept by the Trustees and entries made therein of all receipts and payments and shall be audited annually by a competent chartered accountant.

Power to appoint trustees.

11. The statutory power of appointing new trustees shall apply to this Declaration of Trust.

IN WITNESS *etc.*

(*b*) Provision may be made for the appointment of a committee under whom the trustees will administer the trust.

Form 9

Forms of Certificate under the Finance Act, 1952, to be Inserted in Conveyances on Sale, Voluntary Conveyances, and Leases where a Premium is Paid (*a*).

1. Certificate to be inserted in a Conveyance on sale where the consideration or aggregate consideration does not exceed £500. Variations where such consideration exceeds £500 but does not exceed £3,000 or exceeds £3,000 but does not exceed £3,450 :—

(*a*) By s. 52 of the Finance Act, 1947, the stamp duties on Conveyances, whether on sale or voluntary, and those payable in respect of premiums on leases (whether consisting of money, stock or security) were doubled. There were, however, certain exemptions from, and reductions in, the increased duty, to secure the benefit of which the appropriate Certificate was required in the instrument. By the Finance Act, 1952, these exemptions and reductions were extended as from the day following the passing of the Act. The appropriate form of Certificate to be used will now be the same in each case, the only variation being in the amount of the consideration, the value of the property, or the amount of the premium, as the case may be. There are three cases to be considered.

(1) The old exemption in s. 73 of the Finance (1909–10) Act, 1910, still applies where the consideration or aggregate consideration does not exceed £500. So also does the similar provision in s. 15 of the Revenue Act, 1911, in regard to premiums on leases. These sections remain unrepealed. The duty in these cases is 10s. per cent. The statement required by those Acts for the purpose of obtaining exemption is still applicable, but is in fact in the same form as that required under the Finance Act, 1952.

(2) Where the consideration or aggregate consideration does not exceed £3,000, the duty is £1 per cent.

(3) Where the consideration or aggregate consideration does not exceed £3,450, the duty is one and a half times the duty payable prior to the Finance Act, 1947, *viz.*, £1 10s. per cent. The appropriate certificate must in each case be inserted.

(1), (2) and (3), it is to be noted, do not apply to premiums on leases where the rent exceeds £20 per annum.

The above exemptions apply to conveyances or transfers operating as voluntary dispositions inter vivos, but the reference in the certificate must be to the value of the property instead of to the amount of the consideration.

In regard to leases, the reference should be to the amount or value of the consideration in money, stock or security other than rent.

The doubling of the stamp duty by the Finance Act, 1947, did not apply to conveyances, transfers and leases to a body of persons established for charitable purposes only, or to the trustees of a trust so established: but the stamp duty must be adjudicated. Consequently (2) and (3) do not affect such instruments. But the appropriate Certificate is required in case (1). Under s. 36 of the Finance Act, 1949, the Certificate is to be construed as leaving out of account any sale of goods not actually conveyed.

IT IS HEREBY DECLARED AND CERTIFIED that the transaction effected by this Conveyance does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds [£500] [£3,000] [£3,450].

2. Certificate to be inserted in a voluntary conveyance where the value of the property does not exceed £500. Variations where the value exceeds £500 but does not exceed £3,000 or exceeds £3,000 but does not exceed £3,450 :—

IT IS HEREBY DECLARED AND CERTIFIED that the transaction effected by this instrument does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the property conveyed or transferred exceeds [£500] [£3,000] [£3,450].

3. Certificate to be inserted in a lease where a premium not exceeding £500 is charged, or where the aggregate amount of the premium and the other consideration under any larger transaction or series of transactions of which the lease forms part, does not exceed £500. Variations where the premium or aggregate consideration exceeds £500 but does not exceed £3,000 or exceeds £3,000 but does not exceed £3,450 :—

IT IS HEREBY DECLARED AND CERTIFIED that the transaction effected by this instrument does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration other than rent exceeds [£500] [£3,000] [£3,450] (*b*).

(*b*) This certificate does not apply where the rent exceeds £20 per annum.

Form 10

Clauses to be inserted in a Mortgage of a Dwelling-house where the Money is Advanced on the Purchase of the Property by the Mortgagor, to Provide against the Creation of Unauthorised Tenancies by the Mortgagor either Before or After the Mortgage.

(1) The Borrower shall not exercise his powers (whether by statute or apart from statute) of leasing or agreeing to lease or of accepting or agreeing to accept a surrender of a lease without the consent in writing of the Mortgagee which need not be expressed in any such lease agreement or surrender

(2) (i) The Borrower hereby covenants with the Mortgagee that he has not previously to the date hereof granted or purported or agreed to grant any lease or tenancy of the mortgaged property or any part thereof [other than except such as are mentioned or referred to in this Deed]

(ii) If the Borrower shall have committed any breach of this Covenant the statutory power of sale applicable hereto shall be exercisable as at the date of this Deed without the necessity of giving any notice to the Borrower (*a*)

(*a*) The provisions of subclause (2) are intended to provide against the risk disclosed by the decision in *Universal Permanent Building Society* v. *Cooke and others* [1951] 2 All E.R. 893. See the article "Tenants in Possession and Mortgagees," *ante*, p. 285.

Form 11

Conveyance on Partition under Section 28 of L. P. A., 1925, to the Trustees of a Derivative Settlement of Freeholds Held upon Trust for Sale, the Settlor being at the Time of His Death also Entitled to the Same Freeholds in Undivided Shares (*a*).

THIS CONVEYANCE made the —— day of —— 19— BETWEEN Y of *etc.* and H of *etc.* (hereinafter called "the Trustees") of the one part and D K and B B (hereinafter called "the C K Trustees") of the other part.

Recitals:

WHEREAS:

will of a tenant in common of freeholds before 1926;

(1) By his Will dated the —— day of —— 1920 A B after appointing X and Y of —— (hereinafter called "the Will Trustees") his executors and trustees and after certain bequests not affecting this deed gave devised and bequeathed all his real and personal estate not otherwise disposed of by his Will unto his trustees their heirs executors administrators and assigns UPON TRUST for sale and conversion as therein mentioned with full power to postpone the sale and conversion thereof as therein mentioned and after directing the payment of debts funeral and testamentary expenses and legacies he directed his trustees to hold one equal fourth share or part thereof (thereinafter and hereinafter called "N B's share") UPON TRUST to pay the income thereof to his daughter N B during her life and after her death UPON TRUST for her children on attaining the age of twenty-one years in equal shares as tenants in common, and the Testator declared that the power of appointing new trustees of his said Will should be vested in his daughter during her life

death of testator, a probate of his will;

(2) The said A B died on the —— day of —— 19— and his said Will was duly proved by the executors named therein on the —— day of —— 19— in the Principal Probate Registry

of tenancy in common;

(3) At the time of his death the Testator and L M were seised of the property hereby assured with other property for an

(*a*) Stamp 10s. In a conveyance to a person solely interested in a share the recitals will be the same as in this deed down to recital (8); recitals (9), (10) and (11) will be omitted, and (12) and (13) will require minor modifications. Clause 2 in the operative part will of course be omitted.

estate in fee simple in possession in equal shares as tenants in common

(4) By an indenture dated the —— day of —— 19— and made between the said L M of the first part the Will Trustees of the second part and N Y of the third part for the purpose of affecting a partition of the said property the said L M according to his respective share and interest therein and the Will Trustees as personal representatives of the said Testator A B according to their respective shares granted unto the said N the messuages lands and hereditaments described in the second part of the first schedule thereto (which included the property hereby assured) to the use of the Will Trustees their heirs and assigns to be thenceforth held by them as of the former estate in severalty

of partition deed before 1926;

(5) There were 2 children only of N B namely B B and C B both of whom have long since attained the age of twenty-one years

of family;

(6) The said X died on the —— day of ——

(7) By an appointment of new trustees dated the —— day of —— 19— and made between the said N B of the first part Y of the second part and the said N B and Z of the third part the said N B duly appointed herself to be a trustee in the place of the said X and the said Z to be an additional trustee of the said Will to act jointly with Y for the purposes of the said Will or such of the same purposes as were then subsisting and capable of taking effect

of appointment of new trustees;

(8) The said N B died on the —— day of —— 19— and the proceeds of sale of N B's share thereupon became absolutely vested in B B and C B

of death of tenant for life of a moiety;

(9) The said C B married the said D K on the —— day of ——

of marriage of one of children;

(10) By her Will dated the —— day of —— the said C K appointed the trustees her executors and trustees and after certain legacies devised all her real and personal property to her trustees UPON TRUST for sale and conversion as therein mentioned

will of death of such child and residue in trust for sale;

of death and probate;

(11) The said C K died on the —— day of —— 19— and her said Will was duly proved by the C K Trustees on the —— day of —— in the Principal Probate Registry of the High Court of Justice

of moiety vesting in equity in trustees;

(12) By virtue of the said Will and Probate of the said C K one of the said undivided shares has become and is now vested in the C K Trustees upon the trusts hereinafter declared concerning the property hereby assured

of division of trustees.

(13) The Trustees as such Trustees for sale as aforesaid and in exercise of the power in that behalf conferred by section 28 of the Law of Property Act 1925 have arranged with the C K Trustees [and B B being the person] *or* [and other the persons] interested in possession in the net rents and profits of the said property until sale to make a partition of the said property and for the purpose of giving effect to such partition so far as regards the property appropriated to the last mentioned undivided share (being the property described in the First Schedule hereto) have agreed to execute such conveyance thereof as hereinafter appearing.

NOW THIS DEED made in pursuance of the statutory requirement in this behalf WITNESSETH as follows:—

Conveyance by trustees of original will to trustees of derivative settlement.

1. The Trustees as such Trustees as aforesaid hereby convey unto the C K Trustees All Those pieces or parcels of land situate at —— which premises are more particularly described in the First Schedule hereto TO HOLD the same unto the C K Trustees in fee simple discharged from the said trust for sale imposed by the Will of the said A B.

Trustees to hold on trust for sale.

2. The C K Trustees shall stand possessed of the property hereby assured UPON TRUST to sell the same and shall hold the proceeds of any such sale after payment of costs and the net rent and profits until sale after payment of all outgoings upon the trusts upon which under the said Will of the said C K deceased the same ought to be held from time to time.

Covenant for production.

3. The Trustees hereby acknowledge the right of the C K Trustees to the production of the documents mentioned in the

Second Schedule hereto (the possession of which is retained by the Trustees) and to delivery of copies thereof.

IN WITNESS, *etc.*

THE FIRST SCHEDULE

[*The freehold or leasehold properties conveyed to the C K Trustees*]

THE SECOND SCHEDULE

1920. The hereinbefore recited probate of this date and the Will of A B. 1920.
The hereinbefore recited Partition Deed of this date.

July 5 1945. (*b*) A Statutory Declaration of this date made by (*b*) [some person qualified to do so] deposing as to the contents and loss of the hereinbefore recited appointment of new trustees dated the —— day of —— 19—. July 5, 1945.

(*b*) Where a deed has been lost much trouble would be saved at a later date if a statutory declaration is made as to its loss and its contents and a covenant for production of the statutory declaration is given. There is no need to recite in the Conveyance itself that the document is missing.

Form 12

Conveyance on Sale of a Freehold Dwelling-house and Shop being one of Seven Houses Subject to an Overriding Rentcharge, such Rentcharge being Apportioned on the Sale of Three of such Dwelling-houses and Prior to a Legal Charge Created by the Vendor on Three of the Remaining Four Houses (including in such Charge the Property Conveyed), the Remaining Dwelling-house having been Sold by the Vendor subject to an Apportioned Part of the Rentcharge and before the Present Conveyance. The Chargees Join in to Confirm the Conveyance (*a*).

Drafted by J. J. Somerville, of Gray's Inn

Parties: Vendor; Mortgagees; Purchasers (spouses).

THIS CONVEYANCE made the —— day of —— 19— BETWEEN T of *etc.* (hereinafter called "the Vendor") of the first part M and L both of *etc.* (hereinafter called "the Mortgagees") of the second part and Mr. H. and Mrs. H. both of *etc.* (hereinafter called "the Purchasers") of the third part.

Recitals: of seisin;

WHEREAS:—

(a) At the date of the Incumbrance hereinafter mentioned the Vendor was seised of the property hereby assured together with six other properties under and by virtue of the provisions of a Conveyance dated the —— day of —— 19— (hereinafter called "the Conveyance") made between A and B of the one part and the Vendor of the other part

of property;

(b) The said property is situate with other properties numbered 7 9 11 13 15 and 17 in —— Road in the City of —— and is subject together with such other properties to a perpetual yearly rentcharge of £— (hereinafter called "the Rent") created by an Indenture dated the —— day of —— 189– (hereinafter called "the Rent Grant") made between J and J of the one part and C of the other part and to the covenants and provisions in the Rent Grant for securing payment of the Rent thereby limited in use

of prior conveyances and apportionments and charges;

(c) By the four several Conveyances specified in Part I of

(*a*) Stamp *ad valorem* on the price. The conveyance should be executed in duplicate.

the First Schedule hereto the properties therein shortly described being parts of the property assured by and subject to the provisions of the Rent Grant were conveyed to the respective Grantees therein named in fee simple subject as to each property so conveyed to an apportioned yearly rentcharge of £— (hereinafter called "the Apportioned Rent") and the respective Grantees of such Conveyances named in the said Part I of the said First Schedule charged the properties so conveyed to her him or them with the payment of the Apportioned Rent and all such other moneys (if any) which would become payable under the covenants implied in her his or their conveyance

of legal charge;

(d) By a Legal Charge dated the —— day of —— 19— (hereinafter called "the Incumbrance") made between the Vendor of the one part and the Mortgagees of the other part in consideration of the sum of £— paid by the Mortgagees to the Vendor the property hereby assured together with the said properties numbered 7 and 11 in —— Road aforesaid (being part of the property assured by and subject to the provisions of the Rent Grant) were charged by way of legal mortgage to secure the said sum of £— together with interest thereon as therein expressed

of Conveyance subsequent to legal charge;

(e) By a Conveyance dated the —— day of —— 19— made between the Vendor of the one part and W and W of the other part for the consideration therein mentioned the property shortly described in Part II of the said First Schedule was conveyed to the said W and W in fee simple as joint tenants subject to the Apportioned Rent and to the Grantees' covenants (save for payment of the entire Rent) and conditions therein contained so far as the same were then subsisting but with the benefit of the Vendor's covenants and the powers and remedies in favour of the Grantees contained in the Conveyances specified in Part I of the said First Schedule so far as subsisting

"the Scheduled Conveyances";

(f) The Conveyances mentioned in the said First Schedule are hereinafter called "the Scheduled Conveyances"

of agreement for sale;

(g) The Vendor has agreed with the Purchasers for the sale

and transfer to them of the fee simple of the property hereby assured free from incumbrances subject to the Apportioned Rent for the sum of £—

of state of debt due to Mortgagees;

(h) The said sum of £— remains owing to the Mortgagees on the security of the Incumbrance but all interest thereon has been paid up to the date of this Deed

of agreement of Mortgagees to join in Deed.

(i) It has been agreed that £— part of the said sum of £— shall be paid to the Mortgagees in part discharge of the principal moneys and interest now owing and secured by the Incumbrance and that the Mortgagees shall join in this Deed in manner hereinafter appearing

(j) It has also been agreed that this Deed shall contain the provisions herein expressed.

NOW THIS DEED WITNESSETH as follows:—

Conveyance.

1. IN pursuance of the said agreement and in consideration of the sum of £— now paid by the Purchasers at the request of the Vendor in manner following namely the sum of £— part thereof to the Mortgagees (the receipt whereof the Mortgagees hereby acknowledge) and the sum of £— residue thereof to the Vendor (the receipt and payment in manner aforesaid of which respective sums making together the said sum of £— the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby conveys and grants and the Mortgagees as mortgagees by direction of the Vendor hereby confirm and grant unto the Purchasers

Parcels.

ALL THAT piece or parcel of land situate in and having a frontage to —— Road aforesaid bounded on the north *etc.* on the south by —— Road aforesaid and on the west by the property numbered 17 in —— Road aforesaid (which was conveyed by the Vendor by the Conveyance numbered 2 in the said First Schedule) and containing in the whole — square yards or thereabouts which piece of land is delineated on the plan hereunto annexed and thereon coloured brown TOGETHER with the dwelling-house and shop erected thereon and numbered 19 in —— Road aforesaid.

Subject to:

TO HOLD the said unto the Purchasers in fee simple as joint

tenants subject with the said adjoining properties on the west side thereto to:—

(1) The Rent limited in use by the Rent Grant but partially exonerated therefrom in manner hereinafter appearing; — overriding rentcharge;

(2) The covenants on the part of the Grantee (save for payment of the entire Rent) contained in the Rent Grant so far as the same affect the property hereby assured and are still subsisting; and — Grantee's covenants in original grant;

(3) The covenants by the Vendor and the powers and remedies for the benefit of the Grantees contained in the Scheduled Conveyances. — Vendor's covenants in former conveyances made by him.

[2. IT IS HEREBY DECLARED that the said property is held at the date hereof for use as a dwelling-house and shop together with the right to use the same property for such other purposes as may now or hereafter be authorised with such use aforesaid under or by virtue of the Town and Country Planning Act 1947 or any Act for the time being amending or replacing the same (*b*).] — Declaration of use.

3. As between the property hereby assured and the residue of the properties belonging to the Vendor and assured by and subject to the provisions of the Rent Grant and being numbers 7 and 11 in —— Road aforesaid (hereinafter called "the retained property") the property hereby conveyed shall henceforth stand charged with the Apportioned Rent (part of the Rent) in exoneration of the retained property and the retained property shall stand charged with the payment of the yearly rent of £— the residue of the Rent in exoneration of the property hereby assured (*c*). — Charge of property conveyed with apportioned rentcharge.

4. THE cross covenants (B) referred to in subsection (1) of section 77 of the Law of Property Act 1925 and the cross powers of entry and distress mentioned in subsection (2) of section 190 of the said Act and herein implied (*d*). — Implied statutory covenants.

(*b*) A declaration of use is common in the north of England, but is not often used in the southern half of the Kingdom.

(*c*) This charge can be registered as a general equitable charge: Land Charges Act, 1925, s. 10, Class C (iii). This is an "other charge" within the meaning of s. 18 (1) of the Limitation Act, 1939.

(*d*) The right of entry conferred by s. 190 (2) of the Law of Property Act, 1925, is annexed to the land and is not a legal interest.

Cross charges by Vendor and Purchasers.

5. (1) THE Purchasers hereby charge the property hereby assured with the payment of all such moneys (if any) which may become payable under the covenants herein implied (*c*)

(2) THE Vendor hereby charges the retained property with the payment of all moneys (if any) which may become payable by him under the covenants herein implied (*c*).

Party fences and walls.

6. IT is hereby declared that the walls and fences on the —— side of the property hereby assured are party walls and fences and shall be maintained and repaired as such.

Declarations of trusts;

7. (1) THE Purchasers shall stand possessed of the property hereby conveyed upon trust to sell the same with power at discretion to postpone any sale and shall stand possessed of the net proceeds of sale (after payment of expenses) and of the net rents and profits until sale (after payment of rates taxes costs of insurance repairs and other outgoings) in trust for the Purchasers as joint tenants beneficially

(2) ALL the powers which are by the Settled Land Act 1925 or s. 66 of the Law of Property Act 1925 made exercisable with the leave of the Court shall for the purposes of this Deed be exercisable at the discretion of the trustees for sale without any order of the Court and a mortgagee shall not be concerned to see for what purpose moneys are raised and any persons dealing for money or money's worth may assume that all transactions not authorised under any statutory power have been duly authorised by the persons beneficially interested.

acknowledgments for production.

8. (1) THE Vendor hereby acknowledges the right of the Purchasers to the production of the copy of the Conveyance numbered 1 in the said First Schedule and the duplicate Conveyances of the remaining Conveyances specified in the said First Schedule and also of the documents specified in the Second Schedule hereto (possession of which is retained by the Vendor) and to delivery of copies thereof and hereby undertakes for the safe custody of the same documents

(2) THE Mortgagees hereby acknowledge the right of the Vendor to production of the Incumbrance (the possession of which is retained by them) and to delivery of copies thereof.

Interpretation.

9. THE expressions "Vendor" and "Purchasers" shall

where the context so admits include his successors in title or their successors in title or the successors in title of the survivor of them.

[10. *Certificate of value.*]

IN WITNESS, *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO

PART I

No.	Date	Grantor	Name of Grantee or Grantees	No. of Property in —— Road
1.	19—	Vendor	L. H.	15
2.	19—	Vendor	W. G. A. C.	17
3.	19—	Vendor	W. H. V.	9

PART II

4.	19—	Vendor	W and W	13

THE SECOND SCHEDULE ABOVE REFERRED TO

Particulars of documents acknowledged

Date	Document	Parties

Form 13

Appropriation and Assignment and Appointment of Additional Trustee of the Trust for Sale on Husband Taking Over his Wife's Half Share in House Vested in the Spouses in Part Satisfaction of his £1,000 under his Wife's Intestacy (*a*).

1. *Assignment.*

Parties. THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Husband") and B of *etc.* (hereinafter called "the Son") of the one part and the Husband of the other part.

WHEREAS:

Recitals: conveyance to husband and wife; (1) By a Conveyance dated *etc.* and made between X of the one part and the Husband and C his wife of the other part the freehold messuage known as No.— —— Street —— in the county of —— was in consideration of the sum of £—— provided in equal shares by the Husband and the said C conveyed to them for an estate in fee simple upon trust to sell the same with power to postpone such sale and to stand possessed of the net proceeds of sale after the payment of costs and of the net rents and profits until sale after payment of outgoings in trust for them the Husband and the said C as tenants in common in equal shares

death of wife intestate; (2) The said C died on the —— day of —— 19— intestate

(*a*) When the husband alone or jointly with another takes out letters of administration to his wife's estate he is in the position of a trustee for sale of the estate, and an appropriation of the Wife's half-share to himself might be open to question as a purchase by a trustee from himself. In the case contemplated in this Precedent the Husband and Son are the only persons interested in the estate and can therefore agree to the appropriation, but if there are any other statutory next-of-kin they should be made parties to the assignment. The trust for sale on which the Husband holds the house as survivor cannot be brought to an end without bringing the transaction on to the title; an assent in regard to the wife's half-share would not relate to the legal estate and would therefore not operate under s. 36 of the Administration of Estates Act, 1925, so as to be evidence of his title in favour of a purchaser. Consequently if he wishes to sell at once it is preferable to appoint an additional trustee and sell under the trust for sale, though he could make a title as beneficial owner by disclosing the assignment. On the other hand if he appoints an additional trustee, he may find difficulty in borrowing money on the security of the property from a bank unless the other trustee is willing to guarantee the repayment.

and on the —— day of —— 19— letters of administration to her estate were granted out of the —— Probate Registry to the Husband and the Son

(3) The said C left surviving one child only viz. the Son and with the Husband the only persons entitled to participate in her estate — next-of-kin;

(4) The residuary estate of the said C exceeds or is estimated to exceed the sum of £1,000 with interest thereon to which the Husband is entitled under the Administration of Estates Act 1925 — value of estate;

(5) The Husband is desirous of taking the one half share of the said C in the proceeds of sale of the said messuage in satisfaction *pro tanto* of his right to £1,000 under the said Act and the Son has agreed as well in his capacity as beneficiary as administrator to the same being appropriated accordingly — desire to take over property;

(6) A duly qualified valuer has fixed the value of the said half share at the sum of £——. — valuation.

NOW THIS DEED WITNESSETH as follows:—

1. The Husband and the Son as such administrators as aforesaid and in exercise of the power in that behalf conferred on them by the Administration of Estates Act 1925 and of all other powers hereby appropriate the said half share of the said C deceased in the proceeds of the sale of the said messuage as of the value of £—— in satisfaction *pro tanto* of the sum of £1,000 to which the Husband is entitled in the estate of the said C deceased under the said Act. — Appropriation of share.

2. The Husband and the Son AS PERSONAL REPRESENTATIVES of the said C deceased hereby assign UNTO the Husband ALL THAT the one half share in the net proceeds of sale and the net rents and profits until sale of ALL the property comprised in the said Conveyance TO HOLD unto the Husband absolutely (*b*). — Assignment of share to husband.

IN WITNESS *etc.*

(*b*) The assignment appears not to be essential but it will not attract any further stamp duty. No acknowledgment for production of the Letters of Administration or declaration of no previous assent appears to be necessary. The appropriation appears to attract ad valorem stamp duty and the duty should be adjudicated.

2. *Appointment of Additional Trustee of Conveyance to Husband and Wife* (*c*).

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Appointor") of the one part and B of *etc.* (hereinafter called "the New Trustee") of the other part.

Parties.

WHEREAS:

Recitals: conveyance to husband and wife;

(1) By a Conveyance dated *etc.* and made between X of the one part and the Appointor and C the wife of the Appointor of the other part the freehold messuage known as No. — —— Street —— in the county of —— was in consideration of the sum of £—— provided in equal shares by the Appointor and the said C conveyed to them for an estate in fee simple upon trust to sell the same with power to postpone such sale and to stand possessed of the net proceeds of sale after payment of costs and of the net rents and profits until sale in trust for the Appointor and the said C as tenants in common in equal shares

death of wife;

(2) The said C died on the —— day of —— 19—

(3) The Appointor is desirous of appointing the New Trustee to be a trustee of the said Conveyance in the place of the said C.

desire to appoint.

NOW THIS DEED WITNESSETH that in exercise of the power for this purpose conferred by the Trustee Act 1925 and of all other powers enabling him in that behalf the Appointor hereby

Appointment of new trustee.

appoints the New Trustee to be a trustee in the place of the said C of the aforesaid Trusts declared by the said Conveyance and to act jointly with him the Appointor for all the subsisting purposes thereof.

IN WITNESS *etc.*

(*c*) As to the advisability of this appointment see note (*a*), *ante*.

Form 14

Voluntary Settlement for the Benefit of a Child, with Provision for His or Her Children Present and Future (*a*).

Drafted by A. H. Withers, Barrister-at-Law

THIS SETTLEMENT made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Settlor") of the one part and X of *etc.* and Y of *etc.* (hereinafter called "the Original Trustees") of the other part WITNESSETH and it is hereby agreed and declared as follows:— Parties. Witnesseth.

1. This settlement is made by the Settlor by way of absolute and irrevocable settlement and in consideration of his natural love and affection for his child hereinafter named and for divers other good causes and considerations.

2. In this settlement the following expressions have the following meanings, that is to say:— Definitions.

(a) THE TRUSTEES means the Original Trustees or other the trustees or trustee from time to time of this settlement.

(b) THE TRUST FUND means and includes (1) the sum of £—— already paid by the Settlor to the Original Trustees for

(*a*) Stamp *ad valorem*. This precedent is designed to meet the case of an elderly person of means with children who are married and have started families and can best be helped by a provision of funds for the maintenance and education of their families, so that moneys for these purposes need not wholly come out of the taxed income of the married children or bear estate duty on their deaths.

The real primary objects of the settlement are the married children so that clause 3 enables the trusts to be altered as occasion may require—*e.g.*, to give a life interest to a surviving spouse—and clause 4 enables funds to be taken out of settlement without stamped deeds.

The definition of "the closing date" can be so used as to rule out children born after the Beneficiary attains a specified age (say 50, in the case of a lady) or after a grandchild attains 21. If the Beneficiary is male, the closing date should be fixed by reference not to his death but to the first anniversary of his death.

Existing infant children may die under 21 and the Beneficiary be left childless, at least for a time: in this case, the income must go back to the Beneficiary until the birth of another child. But if desired, the trust can be terminated under clause 3.

It is suggested that it is usually better not to have as trustees the settlor, or the Beneficiary, or the spouse of the Beneficiary. In this connection, section 46 (1) of the Finance Act, 1950, should be borne in mind.

As to clause 9, see Income Tax Act, 1952, s. 399.

the purposes of this settlement; (2) all moneys and investments hereafter paid or transferred by any person or persons to and accepted by the trustees as additions to the trust fund; and (3) the investments and property from time to time representing the aforesaid sum moneys and investments or any part or parts thereof.

(c) THE BENEFICIARY means P of *etc.* who is a child of the Settlor [and was born on the —— day of —— 19—].

(d) THE CLOSING DATE means whichever of the following dates comes first, namely (1) [the first anniversary of] the day of the death of the Beneficiary; [(2) the date on which the Beneficiary attains the age of —— years] and (3) the date on which the age of 21 years is attained by that child of the Beneficiary who first attains that age.

Power of appointment.

3. The trustees shall hold the trust fund and the income thereof UPON TRUST for such person or persons (whether or not being or including the Beneficiary) for such purposes and with and subject to such powers and provisions and generally in such manner in all respects as the Beneficiary and either (1) any two other persons (being trustees of this settlement) or (2) any trust corporation within the meaning of the Trustee Act 1925 (being a trustee or the sole trustee of this settlement) shall by any deed or deeds revocable or irrevocable jointly appoint and in default of and until and subject to any such appointment UPON the trusts and with and subject to the powers and provisions hereinafter declared and contained.

PROVIDED ALWAYS that each trustee shall have an absolute discretion to join or abstain from joining in any such appointment as aforesaid without incurring any responsibility in that behalf and that each trustee in considering whether to join or abstain from joining in any such appointment as aforesaid is hereby authorised and requested (but in no sense required) to consider what in all the circumstances of the case is most for the benefit of the Beneficiary and to give effect to all reasonable requests of the Beneficiary and to ignore entirely the interests of all other persons interested in any manner under the trusts of these presents.

4. Subject as hereinbefore declared the trustees may at any time or times during the life and with the consent in writing of the Beneficiary as to all or any part or parts of the Trust Fund transfer or raise and pay or appropriate the same to the Beneficiary for the absolute use and benefit of the Beneficiary or raise and pay or apply the same for the advancement or otherwise for the benefit of the Beneficiary as the trustees shall think fit. Power of advancement.

5. Subject as hereinbefore declared the trustees shall as from the date hereof hold the Trust Fund and the income thereof on the trusts following that is to say:— Trusts in default of appointment.

(a) All income of the Trust Fund accruing whilst the closing date has not arrived and there is not actually living a child (previously born) of the Beneficiary shall belong to the Beneficiary absolutely.

(b) Subject as aforesaid the Trust Fund and the income thereof as from the date of this deed shall be held in trust for such child or children of the Beneficiary as (1) is or are now living or shall be born before the closing date and (2) attain the age of 21 years and if more than one in equal shares.

AND to this trust sections 31 and 32 of the Trustee Act 1925 shall apply save that the proviso to section 31 (1) and the proviso (*a*) to section 32 (1) shall not apply.

(c) Subject as aforesaid the Trust Fund and the income thereof as from the date of this deed shall be held in trust for the Beneficiary absolutely.

6. During the life and with the consent of the Beneficiary the trustees may invest any money in such manner and in such part of the world as the trustees may think fit and (in particular) in the making of loans at interest with or without security. Power of investment.

7. The power of appointing a new trustee or new trustees shall be vested in the Beneficiary during the life of the Beneficiary. Power to appoint new trustees.

8. Any trustee for the time being hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in the premises Power for professional trustees to charge.

before the expiration of 21 years from the death of the Beneficiary whether in the ordinary course of his profession or business or not and although not of the nature requiring the employment of a solicitor or other professional person.

No benefit to be taken by settlor or his wife.

9. The foregoing provisions of this deed shall take effect subject as follows that is to say:—

PROVIDED ALWAYS that under no circumstances shall any benefit whatsoever be taken under this deed by the settlor or by any woman to whom he has or shall have been married and (*in particular*) no power or discretion created or conferred by this deed or by any appointment made hereunder shall be exercisable in favour of the settlor or any such woman.

[10. *Statement as to value if appropriate*]

IN WITNESS, *etc.*

Form 15

Deed of Partnership between a Father and Son, a Further Share being Held in Trust for an Infant Son on his attaining 22, when he is to be Admitted a Partner (*a*).

Drafted by E. H. Bodkin of Lincoln's Inn

Parties.

THIS PARTNERSHIP DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Father") of the one

(*a*) The object of this Precedent is to provide for the maintenance of the infant son out of the income of the share until he can be admitted as a partner, but so that income not so expended is not treated as his father's income for income tax and surtax purposes. For this purpose the share is made to vest at 22 so as to prevent accumulations of income falling within s. 397 of the Income Tax Act, 1952. Income expended for maintenance will in any event be so treated. If it is desired also to prevent the whole income in the year in which the son attains 21 being so treated, it will be preferable to have a separate declaration of trust of the income of the share with power to accumulate limited by reference to the father's life. This, however, may in certain circumstances attract estate duty, on the father's death outside the five year period and in the circumstances is better avoided. Income not applied under the statutory power of maintenance will under s. 31 of the Trustee Act be accumulated, and will not be treated as the father's income for tax purposes under s. 405 or s. 414 of the Income Tax Act, 1952, as the Settlor can only become entitled on the son's death under 22. It is to his interest therefore to spend as little of the income as possible on maintenance but to maintain the son out of other

part and B of *etc.* (hereinafter called "the Elder Son") of the other part.

WHEREAS:

Recitals:

(1) The Father has for some years carried on the trade or business of —— at —— in the county of ——

father's business;

(2) The Father has agreed to take the Elder Son into partnership with him in the said business for the period and upon the terms hereinafter mentioned and is also desirous of making provision for his younger son —— (hereinafter called "the Younger Son") and for his eventual introduction into the said business as hereinafter provided.

agreement to take in elder son and provide for younger.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows:—

1. The Father and the Elder Son hereby mutually covenant with each other that they will become partners in the business of —— under the style or firm of ——.

Agreement for partnership.

2. The partnership shall continue so long as there shall under the provisions hereof be at least two partners holding their shares in different interests.

Duration of partnership.

3. The business of the partnership shall be carried on at —— aforesaid or at such other premises as the partners shall from time to time mutually agree upon.

Place of business.

4. The firm shall be registered under the Registration of Business Names Act 1916 and the regulations thereunder in the manner and within the time thereby directed and if at any time any change is made or occurs in the particulars required to be furnished for the purpose of such registration a statement specifying the nature and date of such change and signed by all the partners shall forthwith be furnished to the Registrar.

Registration under Business Names Act.

5. The property stock in trade and other assets belonging to

Assets of father's business to be taken over.

income. This decision is best left to the father himself. Further, the surplus income will be invested in the trustee's name. It is thought better, therefore, for the father himself to hold the share on trust for the infant son, his personal representatives becoming on his death sleeping partners. It was formerly the practice in such cases to make use of the Limited Partnership Act and to introduce a nominee as limited partner to hold the share as trustee for the infant, the infant becoming a limited partner himself and having the share assigned to him at 21, and eventually becoming by agreement a general partner. For the above reasons it is considered better for the transaction now to be carried out as above.

the Father in connection with the said business shall become property and assets of the partnership and the debts and liabilities thereof shall be assumed by the partnership and the Father shall stand possessed of the said leasehold premises at —— (which are vested in him for the residue of a term of —— years from the —— day of —— granted by a Lease dated *etc.* at a yearly rent of £——) IN TRUST for the partnership and shall be indemnified by the partnership against the rent reserved by and the covenants and conditions on the part of the lessee contained in the said Lease.

Capital.

6. (1) The capital of the partnership shall be the sum of £—— being the sum at which the said property stock in trade and other assets of the Father have been valued by Messrs. —— after deducting the said debts and liabilities

(2) The said capital shall be credited in the books of the partnership in the proportion of three equal fourth parts to the Father and one equal fourth part to the Elder Son

(3) Any further capital which may be required shall be contributed by the partners in the same proportions

(4) Each partner shall be credited in the books of the partnership with interest at the rate of £—— per cent. per annum on his share of capital for the time being and such interest shall be payable on the —— day of —— in each year before any division of profits is made.

Profits.

7. (1) The partners shall be entitled to the net profits of the business in the shares and proportion in which the capital of the partnership belongs to them and the net profits shall be divided between the partners immediately after settlement of the annual general account in each year

Declaration of trust of share for younger son.

(2) The Father shall stand possessed of one equal fourth part of the capital goodwill assets and profits for the time being of the partnership (being part of his own three-fourth share thereof) IN TRUST for and to be assigned to the Younger Son if and when he shall attain the age of twenty-two years

(3) The statutory power of maintenance shall apply to the profits of the said share and interest on capital payable in respect thereof during the Younger Son's minority and the same shall

be payable to the Younger Son for his own use and benefit after he attains the age of twenty-one years until he attains the age of twenty-two years or previously dies but not so as to vest the capital of the said share

(4) On his attaining the age of twenty-two years the Younger Son shall forthwith execute a proper deed of accession to the partnership defining his rights and liabilities as a partner and thereupon shall become a partner accordingly.

Outgoings and losses.

8. All outgoings and expenses of whatsoever kind and losses incurred in carrying on the partnership business or in any wise relating thereto (including any expenses incurred under the provision for indemnifying the Father against his liability under the said Lease) shall be charged against revenue in the profit and loss account of the partnership and any deficiency appearing from that account shall be borne by the partners in the shares in which they are entitled to the capital and shall be debited to their respective capital accounts accordingly.

Bankers.

9. (1) The bankers of the partnership shall be the —— Bank or such other bank as the partners shall from time to time determine and all moneys and securities belonging to the partnership except such moneys as are required for current expenses shall be paid into and deposited with the said Bank

(2) Each partner shall be entitled to sign cheques.

Drawings.

10. The partners shall be at liberty by monthly drawings or otherwise to draw out of the said business in anticipation of their respective shares of profits and to be accounted for at the next yearly division of profits the following sums viz. the Father in respect of his beneficial share any sums not exceeding £—— the Elder Son any sums not exceeding £—— and the Younger Son if and when he shall become a partner such sums as may be agreed and specified in his deed of accession to the partnership PROVIDED that if in any year the amount so drawn out by a partner shall on taking the annual general account be found to be in excess of his share of the net profits then immediately after such account shall have been taken and settled the excess so drawn out shall be refunded without interest.

Accounts.

11. (1) Proper books of account shall be kept by the partners

and entries made therein of all such matters transactions and things as are usually entered in books of account kept by persons engaged in concerns of a similar nature

(2) The said books of account and all letters papers and documents belonging to the partnership shall be kept at the principal place of business of the partnership and each partner shall at all times have free access by himself or his agent to examine and take copies thereof.

Annual general account.

12. (1) On the —— day of —— and on every subsequent —— day of —— a general account shall be taken of the assets and liabilities and of all dealings and transactions of the partnership during the then preceding year (or in the case of the first of such accounts since the commencement of the partnership) and of all matters and things usually comprehended in accounts of a like nature taken by persons engaged in a like business and in taking such account a just valuation shall be made of all items requiring valuation

(2) Such general account shall be entered in a book which shall be signed by all the partners and where so signed shall be binding on them save that if any manifest error shall be found therein and signified by any partner to the other partner or partners within —— calendar months after such signature the same shall be rectified.

Restrictions on acts of partners.

13. No partner shall without the consent of the other or others (*b*)

(1) Carry on or be concerned or interested directly or indirectly whether financially or otherwise in the business of —— except on account and for the benefit of the partnership nor engage in or undertake any other trade business or manufacture

(2) Become bail surety or security for any person or corporation nor do nor knowingly suffer anything whereby the property of the partnership may be seized attached or taken in execution

(3) Assign or mortgage his share or interest in the partnership except as hereby provided

(*b*) As the younger son is ultimately to become a partner it saves the making of special provisions in his deed of accession to word the deed so as to apply to three partners.

(4) Draw accept or sign any bill of exchange or promissory note or contract any debt on account of the partnership or employ any of the moneys or effects thereof or in any manner pledge the credit thereof except in the usual and regular course of business

(5) Buy order or contract for any real or leasehold property or for any goods or articles for the use of the partnership exceeding the value of £——

(6) (Subject to cl. 18 hereof) hire or except in case of gross misconduct dismiss any clerk traveller or person in the employment of the partnership or take any apprentice.

Partners to devote whole time to business.

14. Each partner shall at all times during the partnership devote the whole of his time and attention to the partnership business and diligently and faithfully employ himself therein and carry on the same for the greatest advantage of the partnership.

Partners to be just and faithful.

15. Each partner shall be just and faithful to the other partner or partners in all transactions relating to the business of the partnership and shall give a true account of the same to them when and so often as the same shall be reasonably required.

To give information.

16. Each partner shall upon reasonable request inform the other partners or partner of all letters accounts writings and other things which shall come to his hands or knowledge concerning the business of the partnership.

To pay separate debts.

17. Each partner shall punctually pay and discharge his present and future separate debts and engagements and shall at all times keep indemnified the other partners or partner and their or his representatives and the property of the partnership against the same and all actions proceedings costs claims and demands in respect thereof.

Father to have control of business.

18. The Father shall have the sole general direction and control of the partnership business and all matters connected therewith including the engagement and dismissal of all clerks travellers and others employed therein and the decision as to the terms of their employment as he may from time to time deem

expedient for the interests and requirements of the partnership business.

Dissolution while younger son under 22.

19. (1) If the Father shall die while the Younger Son is under the age of twenty-two years and the Elder Son shall then be a partner the Father's beneficial share shall accrue equally to the share of the Elder Son and the share held in trust for the Younger Son and the portion thereof accruing to the last-mentioned share shall be held on the like trusts and subject to the like provisions as are hereinbefore contained in relation to the original share so to be held on trust and the Father's personal representatives shall succeed to the original and accruing shares so held on trust and be substituted for the Father as sleeping partners only

(2) If the Younger Son shall die under the age of twenty-two years the share held in trust for him shall vest without payment being made therefor in the Elder Son as on the death of the Younger Son but if the Elder Son shall not then be a partner the said share shall so vest in the Father for his own benefit

(3) If the Elder Son shall die while the Younger Son is under the age of twenty-two years the Father shall have the option of purchasing for his own benefit the Elder Son's share as on the Elder Son's death [but so that no payment shall be made in respect of goodwill] and if such option shall be exercised the share of the Younger Son and the profits and income thereof shall be a charge on the capital goodwill and other assets and the profits and income respectively of the business and the capital thereof but such charge shall not be enforceable by sale until —— years after the Younger Son shall attain the age of twenty-two years (*c*)

(*c*) This is intended to obviate the winding up of the business and to leave the Father free to carry it on. If the Father becomes the only partner, beneficially and as trustee, the partnership would necessarily be dissolved and apart from some such provision the assets would have to be realised.

The provisions as to dissolution generally are intended to keep the business together as long as possible for the benefit of the Younger Son and the Father. Estate duty will be payable on the Father's death within five years in respect of the Son's shares and also on his death at any time in respect of his own share in the goodwill and other assets. Sometimes it would be possible to prevent duty being paid in the latter event on the goodwill passing to the Elder Son if it can be shown that the Father was

(4) If by reason of the death of the Younger Son under the age of twenty-two years the Father and the Elder Son shall become sole partners under the provisions hereinbefore contained then if subsequently the Elder Son shall die while the Father is a partner the Father shall have the option of purchasing the Elder Son's share as on the Elder Son's death [but so that no payment shall be made in respect of goodwill] but if the Father shall die while the Elder Son is a partner his share shall vest without payment being made therefor in the Elder Son as on the Father's death.

Dissolution after younger son becomes a partner.

20. If and when the Younger Son shall attain the age of twenty-two years the shares of the partners shall on dissolution be dealt with as follows that is to say:—

(1) If the Elder Son or the Younger Son shall die or become bankrupt or insolvent or enter into any composition with his creditors or shall suffer his share to be charged for his separate debt and the other partners or partner shall elect to dissolve the partnership as regards him or if the partnership shall be dissolved by the Court on account of his lunacy incapacity or misconduct then and in any of such events the other of them the Elder Son and the Younger Son (if then a partner) shall (subject to any order of the Court) have the option of purchasing the share of the deceased or outgoing partner as from his death or ceasing to be a partner but if he shall not exercise such option within the period hereinafter limited or if only one of them the Elder Son and the Younger Son shall then be a partner the Father shall have the like option to arise at the expiration of such period as though the partnership had then been determined

(2) On the death of the Father his share shall vest without payment being made therefor as on the Father's death in the Elder Son and the Younger Son in equal shares if both are then partners or if only one is then a partner then the whole shall so vest in that one.

Provision as to options to purchase.

21. (1) Every option of purchasing the share of a deceased or outgoing partner hereunder shall be exercised by giving

getting a good bargain by reason of the Son having already helped him to get the business together and that the Father became a mere sleeping partner. See *Att.-Gen.* v. *Boden* [1912] 1 K.B. 539.

notice in writing within three months of the determination to the deceased or outgoing partner or his representatives

(2) The purchase-money for such share shall be the fair value thereof at the date of determination for which purpose an account shall be taken out of his share of unpaid profits up to the date of determination and a valuation made of all assets requiring valuation and (subject as hereinbefore provided) of the goodwill

(3) The purchase-money so ascertained shall be paid by —— equal quarterly payments (the first to be made at the expiration of —— months from the date of determination of the partnership) with interest at the rate of £—— per cent. per annum on the amount for the time being unpaid and shall be secured by the bond of the purchasing partner

(4) The outgoing partner or his representatives shall do all acts and sign all documents necessary to vest in the purchasing partner the goodwill and other assets of the partnership at the date of determination

(5) The costs of carrying this provision into effect shall be borne by the purchasing partner and the outgoing partner or his representatives in shares proportionate to their shares in the capital.

Definition of "share."

22. For the purposes of the three preceding clauses hereof the expression "share" shall mean the relevant share in the capital and the goodwill and other assets and future profits of the partnership and where the context so admits shall include as well an accrued as an original share.

Notices.

23. All notices to be given hereunder shall be sufficiently served by leaving the same addressed to the partner concerned at the principal place of business of the partnership.

Arbitration clause.

24. If during the continuance of the partnership or at any time afterwards any dispute difference or question shall arise between the partners or any of them or their or any of their representatives touching the partnership or the accounts or transactions thereof or the dissolution or winding up thereof or the construction meaning or effect of this Deed or anything herein contained or the rights and liabilities of the partners or their representatives under this deed or otherwise in relation to the

premises then every such dispute difference or question shall be referred to two arbitrators one to be appointed by each party or their umpire pursuant to the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force.

IN WITNESS *etc.*

Form 16

Assignment on Sale of a Dwelling-house and Shop Held on an Underlease at an Apportioned Yearly Rent of £Y part of a Yearly Rent of £X reserved by the Head Lease, and reciting a Deed of Rectification (*a*).

Drafted by J. J. Somerville, of Gray's Inn

THIS ASSIGNMENT made the —— day of —— 19— BETWEEN H. & H. of —— (hereinafter called "the Vendors" which expression shall where the context so admits include their and each of their successors in title) of the one part and J. Limited the registered office of which is situate *etc.* (hereinafter called "the Purchaser" which expression shall where the context so admits include successors in title) of the other part.

WHEREAS:— Recitals:

(a) By an Indenture dated the —— day of —— 19— (hereinafter called "the Lease") made between C D (hereinafter called "the Lessor") of the one part and E and F (hereinafter called "the Lessees") of the other part the property hereby assigned together with other properties with the appurtenances thereof subject to the exceptions and reservations therein contained were demised by the Lessor to the Lessees from the —— day of —— 19— for the term of —— years at the yearly rent of £—— and under and subject to the covenants on the part of the Lessees and conditions therein contained lease:

(b) By virtue of divers mesne assurances acts in the law and events and ultimately by an Assignment dated the —— day of —— 19— made between D B of the one part and the Vendors of devolution of title;

(*a*) Stamp *ad valorem* on price. This precedent concerns the unusual case of lessees who subsequently became underlessees and who are disposing of the sub-term to a purchaser.

the other part the properties comprised in the Lease together with other properties became vested in the Vendors for all the residue of the said term of —— years granted by the Lease subject to the rent reserved by and the covenants and conditions contained in the Lease

assignment; (c) By an Assignment dated the —— day of —— 19— (hereinafter called "the Principal Deed") made between the Vendors of the one part and A. & A. (hereinafter called "the Underlessors") of the other part the property secondly described therein (being a brief description of the property comprised in the Lease) with the appurtenances thereof was (*inter alia*) assigned by the Vendors unto the Underlessors (subject to but with the benefit of the provisions of a Deed of Covenant dated the —— day of —— 19— (hereinafter called "the Covenant") made between X of the one part and S of the other part for the residue of the said term of —— years granted by the Lease subject to the rent reserved by and the covenants on the part of the lessees and conditions contained in the Lease

underlease; (d) By an Underlease dated the —— day of —— 19— (hereinafter called "the Underlease") made between the Underlessors of the one part and the Vendors of the other part for the consideration therein mentioned the property hereby assigned with the appurtenances thereof were subdemised by the Underlessors to the Vendors for the residue of the said term of —— years (less the last —— days thereof) granted by the Lease subject to the payment henceforth of an apportioned yearly rent of £—— part of the said yearly rent of £—— reserved by the Lease and the covenants on the part of the Vendors and conditions contained in the Underlease

rectification of assignment; (e) By a Deed of Rectification dated the —— day of —— 19— (hereinafter called "the Rectification Deed") made between the Vendors of the one part and the Underlessors of the other part after reciting (*inter alia*) that the Rectification Deed was supplemental to the Principal Deed and that the property secondly described and assigned by the Principal Deed was not correctly shown on the plan endorsed thereon and edged blue and that the parcels in the Principal Deed describing the

properties comprised in the Lease included other properties not shown as edged blue on the said plan and it was the intent of the parties thereto that a part of such omitted properties so comprised in the Lease should be assigned to the Underlessors for all the residue of the term of —— years granted by the Lease subject to a reservation to the Vendors of a certain right of way thereover and that the residue of such omitted property should be retained by the Vendors it was thereby witnesseth that the plan annexed to the Rectification Deed should be substituted for the plan endorsed on the Principal Deed and that the parcels and habendum set forth in the Rectification Deed should be substituted as a description of the property secondly described and assigned by the Principal Deed and the habendum therein and that the said rent of £—— reserved by the Lease should as from the date of the Rectification Deed be exclusively charged upon the properties secondly described and assigned by the Principal Deed in exoneration of the residue of the property comprised in the Lease as was not so assigned by the Principal Deed amended as aforesaid

sale agreement.

(f) The Vendors have agreed with the purchaser for the sale to the Purchaser for the sum of £—— of the property hereby assigned which forms part of the property comprised in the Lease and is comprised in the Underlease at the said yearly rent of £——.

NOW THIS DEED WITNESSETH as follows:—

Assignment.

1. IN pursuance of the said agreement and in consideration of the sum of £—— now paid by the Purchaser to the Vendors (the receipt whereof the Vendors hereby acknowledge) the Vendors as beneficial owners hereby assign and grant unto the Purchaser

ALL THAT messuage or dwelling-house and shop situate *etc.*

TO HOLD the same unto the Purchaser for the unexpired residue of the said subterm of —— years (less —— days) granted by the Underlease subject henceforth to :—

(1) As from the date hereof to the payment of the said yearly rent of £—— reserved by the Underlease and the observance and performance of the covenants on the

parts of the Underlessees and conditions by and in the Underlease reserved and contained and

(2) The provisions of the Covenant but with the benefit thereof in so far as such provisions are applicable to the property hereby assigned and

(3) The provisions of the Deed of Rectification but with the benefit thereof in so far as such provisions are applicable as aforesaid.

[2. Declaration of use—retail shop.]

Purchaser's covenants.

3. The Purchaser hereby covenants with the Vendors that the Purchaser will henceforth during the unexpired residue of the Underlease pay the yearly rent of £—— reserved by and observe and perform the covenants on the part of the underlessees contained in the Underlease and will at all times keep the Vendor indemnified against all actions charges claims costs damages demands expenses proceedings and suits whatsoever by reason or on account of the non-payment of the said yearly rent or any part thereof or the breach non-observance or non-performance of the said covenants and conditions or any of them.

4. The Vendors hereby acknowledge the right of the Purchaser to the production of the Principal Deed, the Underlease and the Rectification Deed (the possession of which is retained by the Vendors) and to delivery of copies thereof and hereby undertake for the safe custody of the same documents.

[5. *Certificate of value.*]

In witness *etc.*

Form 17

Deed of Family Arrangement applying the Intestates' Estates Act, 1952, to a death before 1953 (*a*).

THIS DEED of Family Arrangement is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Son) of the first part B of *etc.* (hereinafter called the Daughter) of the second part and C of *etc.* (hereinafter called the Widow) of the third part Parties.

WHEREAS:— Recitals:

(1) X late of *etc.* (hereinafter called the Intestate) died on the —— day of —— 19— intestate and on the —— day of —— 19— Letters of Administration to his estate were granted out of the —— Probate Registry to the Widow and the Son death of husband intestate;

(2) The Intestate left him surviving two children only *viz.* the Son and the Daughter who have both attained the age of 21 years and are with the Widow the only persons entitled to participate in his estate next of kin;

(3) The funeral testamentary and administration expenses debts and liabilities of the Intestate including the duties payable on his death have been paid and discharged and his residuary estate within the meaning of the Administration of Estates Act 1925 now consists of the freehold property investments and cash mentioned in the Schedule hereto payment of debts, etc.;

(4) The Son and the Daughter are desirous that the Widow shall take the like interest in the residuary estate of the Intestate [and be entitled to the like rights] as if he had died after the 31st day of Dec. 1952. desire to give benefit of Act to widow.

NOW THIS DEED made in pursuance of the said desire and by way of family arrangement WITNESSETH and it is hereby agreed and declared as follows:—

1. The Widow shall in lieu of her right under the Administration of Estates Act 1925 to a charge on the residuary estate of Widow to receive £5,000 and interest.

(*a*) Stamp *ad valorem* on the value of the interests given up by the children in the widow's additional benefits. The stamp should be adjudicated. This and the following two forms were drafted by Mr. E. H. Bodkin of Lincoln's Inn.

the Intestate (other than the personal chattels) for the net sum of £1,000 free of death duties and costs with interest thereon from the death of the Intestate at the rate of £5 per cent. per annum until paid or appropriated be and become entitled (in addition to the personal chattels) to a charge on the said residuary estate for the net sum of £5,000 free of death duties and costs with interest thereon from the death of the Intestate at the rate of £4 per cent. per annum until paid or appropriated such interest to be paid primarily out of income [so far as due administration permits] (*b*) and subject to providing for such sum and interest the said residuary estate shall be held on the trusts and with and subject to the powers and provisions upon and subject to which the same are required to be held under the provisions of the Administration of Estates Act 1925 which shall subject as herein specifically provided remain in full force and effect in relation thereto (*c*).

Matrimonial home to be appropriated to widow.

[2. The messuage No. — —— Street shall be appropriated at the value of £—— in satisfaction *pro tanto* of the said sum of £5,000 to be payable to the Widow and the residue thereof and the interest thereon shall be satisfied out of the cash mentioned in the said Schedule and the proceeds of sale of £—— —— stock] (*d*).

Personal representatives to redeem widow's life interest.

[3. (1) The Son and the Widow as personal representatives of the Intestate shall redeem the life interest of the Widow in one moiety of the investments and property mentioned in the said Schedule hereto remaining after providing for the said sum of £5,000 and interest to be payable to the Widow as aforesaid and the costs of raising the same for [the sum of £—— being] the value thereof as estimated in accordance with the rules set

(*b*) The words in square brackets will preserve the right of the personal representative to pay the debts in accordance with the rule in *Allhusen* v. *Whittell*. The Precedent can easily be adapted to a case where the debts, etc., have not yet been paid.

(*c*) The trusts are the same under both Acts when the issue have, as here, vested interests, *viz.*, a life interest in one half for the widow and subject thereto in trust equally for the children.

(*d*) This appropriation is intended to be in satisfaction of her right to the matrimonial home under the Intestates' Estates Act, 1952, Second Schedule.

out in section 47A (2) of the Administration of Estates Act 1925 as added by the Intestates' Estates Act 1952 (*e*)

(2) The Son and the Widow shall on completion of the redemption of the Widow's life interest assent to the vesting of the real estate then forming part of the said residuary estate vesting in the Son and the Daughter.]

Covenant to pay duties.

4. The Widow hereby covenants with the Son his executors and administrators that if any duty shall become payable by reason only of the determination of her life estate in the residuary estate of the Intestate or any part thereof then she the Widow her executors and administrators will immediately upon the same becoming due pay and discharge the same and will keep the Son his executors and administrators effectually indemnified against the same and every part thereof and all actions proceedings costs charges claims and demands whatsoever in respect thereof (*f*).

Parties to execute necessary deeds.

5. Each of the parties hereto and their respective executors and administrators shall execute all such deeds and documents and do all such acts as may be necessary or be deemed expedient to give complete effect to this Deed and the costs of the preparation stamping and execution of such documents (inclusive of this Deed) shall be paid by the Widow.

IN WITNESS *etc.*

Form 18

Receipt by Widow for money paid for Redemption of her life interest in a moiety of her Husband's Estate (*a*).

WHEREAS:—

(1) I A of *etc.* am entitled as the lawful Widow of X deceased (who died on the —— day of —— 19— intestate and

(*e*) The value cannot be exactly calculated until the £5,000 has been actually raised, but as the parties are the only persons interested this is immaterial.

(*f*) If the house is appropriated and the "Chancellor's concession" applies it may be advisable to provide for payment by the personal representatives of any additional duty. See *Re Dowse* [1951] 1 All E.R. 558.

(*a*) Under s. 47A of the Administration of Estates Act, 1925, which is added by the Intestates' Estates Act, 1952, a surviving husband or wife can elect that the personal representatives shall purchase or redeem his or

letters of administration to whose estate and effects were granted to B and C on the —— day of —— 19—) to a life interest in one moiety of his residuary estate

(2) On the —— day of —— 19— pursuant to the Administration of Estates Act 1925 as amended by the Intestates' Estates Act 1952 I gave notice in writing to the said B and C as such administrators as aforesaid that I elected that they should redeem my said life interest

(3) The redemption money for my said life interest in the investments and property appropriated to the said moiety of the residuary estate of the said X reckoned in accordance with the provisions of the said Acts and having regard to my expectation of life (my age being —— years) is £Y.

Now I hereby acknowledge that I have this —— day of ——

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her life interest in part of the residuary estate by paying the capital value thereof as ascertained by the rules set out in that section. The election is to be exercised by notifying the personal representatives (or those other than the surviving spouse) in writing, and must be made within 12 months of the date when representation is first taken out, unless the court extends the time. If the spouse is sole personal representative, notice must be given to the principal probate registrar. An election may validly be made by an infant spouse.

The section refers to a life interest in "part of the residuary estate" instead of "the residuary estate or part thereof" as in the old section; this apparently means the whole of the moiety in which alone the spouse can now have a life interest. It does not, it seems, include a fraction of such moiety or any particular property forming part of such moiety, though the value thereof can in fact be calculated by reckoning the value of the whole in accordance with the Act and ascertaining the proportion representing such property or part. This follows from the fact that when the estate comprises any reversions property must have been appropriated to the part of the estate in which the life interest subsists. The section expressly enacts that an election can only be made if the whole of that part consists of property in possession, though it also provides for apportionment where it consists partly of reversionary property and partly of property in possession.

The valuation is based on the price of a Government annuity for the spouse's life purchased through the Post Office Savings Bank of an amount equal to the income which would be produced by the part of the residuary estate affected if it were reinvested in $2\frac{1}{2}$ per cent. Consols, reduced by 5 per cent. If the spouse is over 80 a special further reduction must be made.

The personal representatives may raise the redemption money and costs on the security of the whole or any part of the residuary estate or it may be satisfied partly or wholly by an appropriation under the statutory power.

received from the said B and C as such administrators as aforesaid the said sum of £Y [as to £Z part thereof in cash and as to the remainder by the transfer of investments appropriated thereto with my consent] in redemption of my said life interest in the said investments and property.

AS WITNESS *etc.*

Form 19

Indemnity to Administrators on Redemption of Life Interest of Widow in part of her Husband's Residuary Estate (*a*).

THIS INDEMNITY is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Widow) of the one part and B of *etc.* of the other part — Parties.

WHEREAS: — Recitals:

(1) D late of —— in the County of —— (hereinafter called the Intestate) died on the —— day of —— 19— intestate and on the —— day of —— 19— letters of administration to his estate were granted out of the —— Probate Registry to the Widow and the said B (hereinafter collectively referred to as the administrators) — death of husband intestate;

(2) The Intestate had issue three children and no more *viz.* the said B and E and F who are of full age and with the Widow the only persons entitled to share in his estate — issue of husband;

(3) The Administrators have paid the funeral testamentary and administration expenses debts and other liabilities of the Intestate and the duties payable on his death and have paid to the Widow the net sum of £5,000 and have paid her interest thereon from his death (so far as consistent with due administration out of income) to which the Widow is entitled under the Administration of Estates Act 1925 (as amended by the Intestates' Estates Act 1952) and have handed over to her the personal chattels as defined in the said Act — payment of £5,000 to widow;

(4) The [moiety of the residuary estate in which the Widow is entitled to a life interest] [residuary estate of the Intestate] — appropriation of moiety;

(*a*) See Note to last Precedent.

is now represented by the investments and property specified in the Schedule hereto (*b*)

notice to redeem;

(5) Under and by virtue of the power for that purpose conferred by the Administration of Estates Act 1925 (as amended by the Intestates' Estates Act 1952) the Widow on the —— day of —— 19— gave notice to the said B of her election that the Administrators should redeem her life interest in [one moiety of] the said investments and property specified in the said Schedule [being the investments and property specified in the second Schedule hereto] [the messuage and premises No. —— —— Street in the City of —— referred to in the said Schedule]

value of life interest;

(6) The annual value of the Widow's life interest in the [moiety of the] said [investments and property] [messuage and premises] if the same were re-invested as provided by the said Act has been ascertained [by valuation] to be £X and the amount which if invested in an immediate Government Annuity through the Post Office for the life of the Widow (having regard to her expectation of life she being of the age of —— years) would produce an annuity of £X is the sum of £Y

payment of redemption money and costs;

(7) The said sum of £Y (less five per cent. thereof) and the costs of the transaction have been raised by the Administrators out of the portion of the residuary estate other than that in which the Widow is entitled to a life interest and the Administrators have paid to the Widow the said sum of £Y (less five per cent. thereof) in redemption of her said life interest in the [said moiety of the] said [investments and property] [messuage and premises] as she hereby admits and declares

agreement for indemnity;

(8) It was agreed that upon such redemption being effected as aforesaid the Widow should give the said B such indemnity as is hereinafter contained.

Indemnity to co-administrator.

Now in pursuance of the said agreement and in consideration of the premises THIS DEED WITNESSETH that the Widow hereby covenants with the said B that she the Widow her executors and

(*b*) The life interest to be redeemed must strictly be in the property appropriated to her moiety. But where an indemnity is given, as here, there seems no objection to redeeming the widow's life interest in a fraction of the whole estate or of the appropriated moiety, or in specified property forming part thereof.

administrators will at all times hereafter keep the said B his executors and administrators and the estate and effects of the Intestate effectually indemnified against all actions proceedings claims and demands on the part of the said E and F or either of them or their respective personal representatives or any other person or persons whomsoever and all costs charges and expenses in respect of the said life interest in the said [moiety of] the [said property and investments mentioned in the said Schedule hereto] [messuage and premises] so redeemed as aforesaid and the said sum of £Y (less five per cent. thereof) so paid by the Administrators for the redemption thereof as aforesaid and the payment of the said costs or in any way arising out of or consequential upon such redemption and payment or otherwise in respect of the premises.

IN WITNESS *etc.*

Form 20

Conveyance of One of Two Adjoining Cottages with a General Grant and Reservation of Easements (*a*)

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the Parties.

(*a*) Though it is important on a severance of two messuages to define specifically what rights are to be granted or reserved it may happen, especially where they are or have been in the occupation of tenants, that the vendor may not know, or wish to commit himself in regard to, the mutual rights which have in fact been used and which may be important to the enjoyment of the two premises.

The precedent is intended to cover cases where for any reason it is desired to grant and reserve such rights in general terms.

There is in general no implied reservation in favour of the vendor except of easements of necessity, and the reservation in the above precedent could not strictly be required except where the contract provides for it. But some general conditions provide for the mutual grant and reservation of such rights, *e.g.*, the National Conditions of Sale, and it is generally fair to do so. The rights granted to the purchaser could only be objected to by the vendor if he could show they operated to grant some right not implied in the contract.

A provision in the conveyance negativing the purchaser's right to light and air over the property retained by the vendor is provided for both by the National and the Law Society's Conditions of Sale. The form in the above precedent will not amount to an agreement to prevent the acquisition

one part and B of *etc.* (hereinafter called "the Purchaser") of the other part.

Recitals:

WHEREAS:—

title of vendor and agreement for sale.

(1) The Vendor is the estate owner of the fee simple in possession free from incumbrances of the property hereinafter assured and has agreed to sell the same to the Purchaser but subject to and with the benefit of the rights and privileges hereinafter reserved and granted for the sum of £—.

NOW THIS DEED WITNESSETH as follows:—

Conveyance.

1. In pursuance of the said agreement and in consideration of the sum of £— now paid by the Purchaser to the Vendor (the receipt and payment whereof the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby conveys unto the Purchaser

Parcels.

ALL THAT messuage or tenement with the yard garden and outbuildings thereto belonging situate and being No. 2 —— Road in the Parish of —— in the County of —— [which premises are delineated on the plan hereto annexed and thereon coloured red] TOGETHER with all easements quasi-easements rights and privileges now or heretofore occupied or enjoyed therewith or which would be implied against the Vendor on severance [except rights of light air or otherwise which would restrict or interfere with the free use of the adjoining messuage and land of the Vendor being No. 1 —— Road aforesaid for building or other purposes]

Reservation to Vendor.

Except and Reserving unto the Vendor and his successors in title owners and occupiers of the said messuage No. 1 —— Road aforesaid all easements quasi-easements rights and privileges now or heretofore occupied or enjoyed with the same messuage over or in relation to the property hereby assured

Habendum.

TO HOLD reserved as aforesaid unto the Purchaser in fee simple.

[2. Acknowledgment for right to production of documents.]

[3. Statement as to value.]

IN WITNESS *etc.*

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of a prescriptive right, but time will run in the purchaser's favour as regards any rights in fact enjoyed over the vendor's property subsequently to the conveyance.

Form 21

Settlement on an Unmarried Daughter of Registered Leasehold Property Subject to a Charge, and Transfer to Trustees (*a*)

1. *Settlement.*

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the first part B of *etc.* of the second part C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part. Parties.

WHEREAS the Settlor is registered under the Land Registration Acts 1925 and 1936 as proprietor of the property comprised under the heading County or County Borough —— Title No. — Property —— with a good leasehold title subject to a Charge in favour of E for securing payment of the principal sum of £— and interest thereon at the rate of £— per cent per annum registered on the —— day of —— 19— and is desirous of settling the same property subject to the said Charge for the benefit of his daughter the said B (hereinafter called "the Daughter") in manner hereinafter appearing. Recital of title subject to charge.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for the Daughter WITNESSETH and It is hereby agreed and declared as follows:—

1. The Settlor hereby covenants with the Trustees that he will forthwith execute a Transfer of the said property to the Trustees already prepared. Covenant to execute transfer to trustees.

2. The Trustees hereby covenant with the Settlor that they will forthwith after the execution of the said transfer apply for registration of themselves as proprietors of the said property with the restriction therein mentioned. Covenant by trustees to be registered.

3. Immediately upon such registration the Trustees shall stand possessed of the said property UPON TRUST that they shall with the consent of the Daughter during her life and after her death at their discretion sell the same or any part thereof with power to postpone such sale and shall hold the net proceeds of any such sale (after payment of costs) and of the net rents and Trust for sale.

(*a*) It is assumed the daughter is over 21.

profits of such part of the said property as shall for the time being remain unsold (after payment of outgoings) UPON TRUST with the like consent or at the like discretion to invest the same when received and any other capital moneys which may be received by the Trustees in their names in or upon any of the investments hereinafter authorised with power with such consent or at such discretion to vary such investments for others of a nature hereby authorised.

Definition of trust fund.

4. The Trustees shall hold the net moneys to arise from any such sale and any such capital money as aforesaid and the investments for the time being representing the same respectively (which moneys and investments are hereinafter called the Trust Fund) and the income thereof and the net rents and profits of the unsold portion for the time being of the said property (which net rents and profits are hereinafter deemed to be included in the income of the Trust Fund) Upon the Trusts and with and subject to the powers and provisions following that is to say:—

Trusts for daughter at 35:

(1) IN TRUST for the Daughter if and when she attains the age of [35] years

with substitution of her children;

(2) If the Daughter shall die under the age of [35] years leaving a child or children her surviving the Trust Fund shall be held IN TRUST for all or any the children or child of the Daughter who being male shall attain or shall have attained the age of 21 years or being female shall attain or shall have attained that age or shall marry or shall have been married under that age and if more than one in equal shares

(3) Until the Daughter shall attain the age of [35] years or die under that age the income of the Trust Fund shall be paid to the Daughter for her own use and benefit absolutely but not so as to vest the capital

power to appoint life interest to husband.

(4) The Daughter may by deed [revocable or irrevocable] executed prior to and in contemplation of marriage or by will or codicil appoint that as from her death the income of all or any part or parts of the Trust Fund shall be paid to any person who may be the husband of the Daughter at her death for his life or any less period and subject to such restrictions as

she shall think fit and any such appointment may be made upon protective trusts for the benefit of such husband or otherwise and subject to any conditions she may think fit and any such appointment may provide that if the interest so appointed shall fail or be determined under the trusts applicable thereto or a condition in such appointment contained the same shall during the residue of the life of such husband be applied at the discretion of the Trustees for the benefit of such husband and such other person or persons as may thereby be declared

(5) Any interest appointed under the power conferred on the Daughter by the last preceding sub-clause hereof shall take effect in priority to all other trusts and provisions hereinbefore declared and contained concerning the Trust Fund to take effect after her death and so that the power of advancement in favour of her children herein incorporated shall not be exercised after such appointment shall have taken effect so as to affect the interest of such husband without his consent in writing

Powers of maintenance and advancement.

(6) The statutory power of advancement in relation to the contingent interest of the Daughter in the Trust Fund shall not be excluded by anything herein contained and the statutory powers of maintenance and advancement shall apply from and after the death of the Daughter in relation to the shares of the Daughter's children or issue

Ultimate trust.

(7) Subject to the trusts hereinbefore declared and to any exercise of the powers herein incorporated the capital and income of the Trust Fund shall be held IN TRUST for —— absolutely (*b*).

Covenant to pay rent under lease.

5. The Daughter hereby covenants with the Trustees that she the Daughter will as from the date hereof and during her life save harmless and keep indemnified the Trustees or other the trustees or trustee for the time being hereof and each of them and the estate and effects of each of them from and against the payment of the rent reserved by and the observance and performance of the covenants agreements

(*b*) If it is desired to avoid any possibility of income accumulated after the daughter's death during the children's minorities being treated as the settlor's income for income tax and surtax purposes the ultimate trust should not be for the settlor. See Income Tax Act, 1952, ss. 405, 414.

and conditions contained in the Lease under which the said property is held and on the part of the lessee to be observed and performed and all actions proceedings costs claims and expenses on account of any omission to pay the said rent or any breach of the said covenants agreements and conditions.

6. The Daughter hereby covenants with the Settlor that if and when payment of the said principal sum secured by the said registered charge and the interest now due and to accrue due thereon is lawfully demanded she will pay the same to the chargee or the persons deriving title under him and will keep the Settlor effectually indemnified against the same and every part thereof and all actions proceedings costs charges claims and demands in respect thereof and the Trustees shall not be personally liable to indemnify the Settlor in respect of the said principal sum and interest.

Power to invest.

7. Money subject to the trusts hereof may be invested in the purchase (including purchase as a residence for any person beneficially interested in possession hereunder) of or upon the security of such land or immovable property of any tenure (but not situate outside England and Wales) or of such personal or movable property (including stocks shares funds or securities) whatsoever and wheresoever or any interest therein respectively and whether involving liability or not (but excluding personal credit without security) as the Trustees in their absolute discretion think fit with power to vary such investments to the intent that the Trustees shall have the same full and unrestricted power of investing and varying investments in all respects (subject as aforesaid) as if they were absolutely and beneficially entitled to the trust money to be invested.

Power to make improvements on land, etc.

8. The Trustees may raise and apply trust money in (i) making improvements upon any land subject to the trusts hereof or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections thereon (ii) complying with the requirements of any order or direction for the provision of fixed equipment under the Agriculture Act 1947 or any statutory modification or re-enactment thereof (iii) payment of the costs of and incidental

to obtaining permission for development of or payment of compensation in respect of any land subject to the trusts hereof pursuant to any Act relating to planning control and all compensation (whether for depreciation of development value or otherwise) shall be capital.

Power to make arrangements, etc.

9. The Trustees shall have power (1) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (2) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all moneys remaining due thereon and to vary the terms of any such security.

Liability of trustees.

10. The Trustees shall not be personally liable for breach of trust or otherwise if they act upon the opinion of counsel of not less than 10 years' standing as to what moneys are to be considered capital or income and whether any expenses outgoings or other payments ought to be paid out of capital or income or as to any other questions or matters of doubt arising in the execution of the trusts hereof.

Power of appropriation.

11. The Trustees may exercise the powers of appropriation conferred by section forty-one of the Administration of Estates Act 1925 without any of the consents requisite for the exercise of such powers by personal representatives.

[12. Power for professional trustee to charge.]

Power to appoint trustees.

13. The power of appointing a new trustee or new trustees hereof shall be vested in the [Daughter] [Settlor] during [her] [his] life.

Covenant to pay duty on settlor's death.

[14. The Settlor hereby covenants with the Trustees that he or his personal representatives will discharge any duty which may become payable in respect of the Trust Fund by reason of his death within 5 years of the date hereof immediately on the same becoming payable.]

IN WITNESS *etc.*

2. *Transfer to Trustees.*

H.M. LAND REGISTRY

Land Registration Acts 1925 and 1936

County or County Borough ——
Title No. ——
Property ——

Dated the —— day of —— 19— Pursuant to a Settlement dated the —— day of —— 19— and made between myself of the first part B of *etc.* of the second part and C of *etc.* and D of *etc.* of the third part

I A of —— in the County of —— hereby transfer to the said C and D the land comprised in the title above referred to And apply for the entry of the following restriction namely:—

No disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capital money arises is to be registered except under an order of the Registrar or of the Court nor shall any disposition by way of sale be made without the written consent of D.

And it is hereby declared that by the said Settlement the power of appointing a new trustee or new trustees thereof is vested in [me] [the said B] during [my] [her] life.

[*Certificate as to value if required.*]

IN WITNESS *etc.*

Form 22

Power to Trustees to Act on the Opinion of Counsel, for Use in Wills and Settlements (*a*)

The Trustees shall not be personally liable for breach of trust or otherwise if they act upon the opinion of counsel of

(*a*) A power giving the trustees power to determine questions which attempts to make the trustees' decision conclusive and binding on the beneficiaries is void, both as repugnant to the benefits conferred by the will and as an attempt to oust the jurisdiction of the court: *Re Wynn's*

not less than 10 years' standing as to [what articles pass under any specific bequest and] whether any moneys are to be considered as capital or income and whether any expenses outgoings or other payments ought to be paid out of capital or income or as to any other questions or matters of doubt arising in the execution of the trusts hereof [of my will or any codicil thereto].

Will Trusts [1952] 1 All E.R. 341. It was also said in the above case that such a clause was therefore not very desirable as it was likely to mislead the beneficiaries and trustees as to their rights. A power in the above form, it is submitted, does not attempt to oust the court's jurisdiction, and it may avoid unnecessary litigation by inducing the beneficiaries to submit to the trustees' decision: it will relieve the trustees of liability even if the beneficiaries ultimately decide to take the matter to the court and the decision is held to be incorrect. The trustees have power under s. 15 of the Trustee Act, 1925, to apportion blended funds, so this need not be given.

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